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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 4, 1929

CERTIORARI GRANTED NOVEMBER 25, 1929

(34,559)

(34,559)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1929

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[a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND, SITTING AS A COURT OF CLAIMS

No. —

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant

PETITION TO RECOVER CERTAIN TAXES, ETC.—Filed April 27, 1927

[fol. 2] The petition of James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, deceased, respectfully shows to the Court:

1. That plaintiffs are residents of the State of Maryland and bring this complaint as administrators of the estate of James E. Tyler, deceased, who died a resident of the State of Maryland on or about May 7, 1918.

2. Plaintiffs were duly appointed administrators of the estate of said James E. Tyler, deceased, by the Orphans' Court of Baltimore City on the 23rd day of May 1918, and were at all times since and now the duly qualified and acting administrators of said estate.

3. On or about May 21, 1921 and June 14, 1921, plaintiffs, as said administrators, paid to Joshua W. Miles, the Collector of Internal Revenue for the defendant in the United States Collection District of the State of Maryland, the aggregate sum of $8,949.93 as a Federal estate tax claimed by the defendant and said Collector to be due by plaintiffs as administrators of said estate to defendant as an estate tax under the provisions of the Revenue Act of 1917.

4. Said Joshua W. Miles is not now in office as Collector of Internal Revenue for the collection district of the State of Maryland.

5. At the time of the death of said decedent, James E. Tyler, the decedent and his wife, Ida H. Tyler, were owners as tenants by the entirety of 349 shares of stock of the Kimball-Tyler Company. The value of this stock was not included by plaintiffs in the gross estate of said decedent in their estate tax return filed with said Collector of Internal Revenue. Subsequently, the Commissioner of Internal Revenue determined the value of said 349 shares of stock to be $59,193.42 and included said value in decedent's gross and net estate and a Federal estate tax was paid thereon by plaintiffs as administrators of said estate.

6. On or about September 15, 1924, plaintiffs filed with the Collector of Internal Revenue at Baltimore, Maryland, [fol. 3] a claim for refund of the amount of tax paid defendant by reason of the inclusion in the net estate of said decedent of the value of the stock of the Kimball-Tyler Company as aforesaid. Said claim was based on the contention that property owned by the decedent and his wife as tenants in the entirety was not properly taxable as a part of the decedent's gross estate. A copy of said claim for refund is hereto attached and marked Exhibit A.

7. On or about April 27, 1925, the Commissioner of Internal Revenue, acting for defendant, rejected said claim for refund in full and refused to pay any part thereof to plaintiffs.

8. Plaintiffs say that the action of the Commissioner of Internal Revenue, acting for defendant, in subjecting to the Federal estate tax the value of said shares of stock in the Kimball-Tyler Company owned by the decedent and his wife as tenants in the entirety was erroneous and illegal and his further action in rejecting said claim for refund was erroneous and illegal, in that said shares of stock were not a part of the decedent's gross estate at the time of the decedent's death. But by virtue of the ownership of said stock in the entireties by decedent and his wife, Ida H. Tyler, said Ida H. Tyler was the owner of said stock by right of survivorship at the time of the decedent's death and not by virtue of descent and distribution and was the owner of the part and the whole of said stock prior to the date of the decedent's death.

9. Plaintiffs allege that the action of said Commissioner of Internal Revenue in including the value of said shares of stock in the decedent's gross estate was an attempt to measure the tax imposed on the decedent's gross estate by the value of property owned by another at the time of said decedent's death and accordingly the assessment and collection of said tax was erroneous, illegal and without authority to support it.

10. The tax paid by plaintiffs as the administrators aforesaid and now being withheld by defendant through its officers and agents on the value of the said stock of the [fol. 4] Kimball-Tyler Company is $2,991.87, and the amount of accrued interest which plaintiffs paid to defendant on said $2,991.87 was $365.91.

Wherefore, the premises considered, plaintiffs pray:

1. That process issue requiring defendant to appear and answer this complaint.

2. That judgment be rendered against defendant for the sum of $3,357.78, tax and accrued interest paid by plaintiffs to defendant and wrongfully withheld by defendant from plaintiffs on the value of said stock in the Kimball-Tyler Company, together with interest on said sum in such cases made and provided, and the costs of this suit.

J. Edward Tyer, Jr., Wm. G. Tyler, Administrators of the Estate of James E. Tyler, Deceased. Tyler & England, Frank S. Bright, Lowndes C. Connolly, Attorneys for Plaintiffs.

Duly sworn to by James E. Tyler, Jr., and Wm. G. Tyler. Jurat omitted in printing.

[fol. 5] EXHIBIT "A" FOR PETITION

(Execute separate form for each tax period)

Form 843—Jan., 1922

Treasury Department, Internal Revenue Service

Comptroller General U. S., January 18, 1922

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation

District: ——.
Account Number: ——.
Date received: ——.
Stamp here: —— ——, Collector of Internal Revenue.

Claim for

—Abatement of Tax Assessed

—Credit Against Outstanding Assessments

—Refund of Taxes Illegally Collected

—Refund of Amounts Paid for Stamps Used in Error or Excess

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit: Stamp here: ——.

STATE OF MARYLAND,
City of Baltimore:

Type or print.

(Name of taxpayer or purchaser of stamps:)

James E. Tyler, Jr. and William G. Tyler, Administrators of the Estate of James E. Tyler, deceased, (Residence—

give street and number as well as city or town and State:) 612 Equitable Bldg., Baltimore, Md. (Business address.)

This dependent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

[fol. 6] Period: From ——, Year 19—, to ——, 19—

1. Business in which engaged, Lawyer.
2. Character of assessment or tax: Additional Federal Estate Tax.

(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased	$6,384 83
4. Reduction of Tax Liability requested (Income and Profits Tax)	$.....
5. Amount to be abated	$.....
6. Amount to be refunded (or such greater amount as is legally refundable)	$4,308 83

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): May 21, & June 14, 1921.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.
9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit	$.....
11. Unpaid assessment against which credit is asked; period from —— to ——	$.....

Dependent verily believes that this application should be allowed for the following reasons:

There was included by the Department in the gross estate of the deceased, and the tax paid thereon by your deponents, the value of 372 shares of the Kimball-Tyler Company. This stock was taxed by the Government as property held by the deceased and his wife as tenants in the

entirety. As shown by a claim for refund heretofore filed by your deponents in this estate, 24 shares of this stock was the property of your affiant, James E. Tyler, Jr., and should not have been taxed in any case. The remaining 348 shares were, as held by the Department, owned by the deceased and his wife as tenants in the entirety. It is submitted that under the decision of the U. S. Court of Claims in Blount v. United States, March 3, 1924, no part of this stock is subject to the estate tax, and the tax paid thereon [fol. 7] should be refunded. Deponents request that, if necessary, they be accorded all rights as to conferences and filing of briefs. A certificate of the court showing that the appointment of deponents *is* in effect is on file with the former claim for refund.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this — day of ——, 19—. ——, (Title:) ——.

(Signed) James E. Tyler, Jr.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

c2—11704.

In United States District Court

Pleas—Filed June 8, 1927

The United States of America, by A. W. W. Woodcock, United States Attorney, says for pleas to the declaration in the form of a petition filed against it by the plaintiffs:

1. That it never promised as alleged.
2. That it is not indebted as alleged.

A. W. W. Woodcock, United States Attorney.

[fol. 8] In United States District Court

Docket Entry

June 8, 1927.—"Issues joined".

IN UNITED STATES DISTRICT COURT

LAW. 3240

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,

vs.

UNITED STATES OF AMERICA

OPINION—Filed October 19, 1928

COLEMAN, District Judge:

There are two questions presented by this proceeding; (1) whether the value of shares of stock, acquired by a decedent and his wife as tenants by the entireties subsequent to the effective date of the Revenue Act of 1916, is to be included in the gross estate of such decedent for estate tax purposes under the provisions of that Act; and (2) if so, whether such inclusion is constitutional.

The following facts appear from the statement which, by agreement, has been stipulated in the case. James E. Tyler, a resident of Baltimore, Maryland, died there intestate on May 7th, 1918. In due course, a return was made for deferal estate tax purposes and a tax of $2,062.45 was paid upon an estate of $76,561.24. Thereafter, following a review of the return by the Commissioner of Internal Revenue, other items were included in the estate's inventory, increasing the net estate to $207,454.60, upon which an additional tax of $6,384.83 was levied and paid. In this revised inventory, the Commissioner included 349 shares of the Kimball-Tyler Company, a West Virginia corpora-[fol. 9] tion, standing in the names of the deceased and his wife as tenants by the entireties. The stock had previously stood in the name of the deceased alone, but in November 1917, it had been transferred by him as above. The plaintiffs, administrators of Mr. Tyler's estate, now contend that the inclusion of this stock as part of the gross estate of Mr. Tyler and the resulting tax thereon, were improper and that they are, therefore, entitled to a tax refund which, as is stipulated, aggregates $3,337.67 with 6% interest from June 14th, 1921, to the date of judgment. The basis of

plaintiffs' contention is (1) that Congress, by Section 202 (c) of the Revenue Act of September 8, 1916, Chapter 463, (39 Stat. 777), did not intend to tax the interest of a decedent as a tenant by the entireties and (2) that if Congress did so intend, this Section is in violation of the Fifth Amendment and also of Article 1, Section 2, Clause 3 and Section 9, Clause 4 of the Federal Constitution.

The pertinent provisions of the Act are Section 202 (c) above referred to, and Section 201, which read as follows:

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentage of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon *the transfer* of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * *

"(c) To the extent of the interest therein held jointly *or as tenants in the entirety* by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent." (Italics inserted.)

[fol. 10] Considering the first question, namely, is the interest of tenants by the entireties embraced within the language of the foregoing provisions, the Court feels that there is no basis whatsoever on which to argue that it is not. It is true that this peculiar form of tenancy, the characteristics of which are hereinafter fully analyzed, is generally described in the law as one "by the entirety" or "by the entireties," and not "in the entirety," but this is a distinction merely of phraseology and immaterial in the face of the obvious intent of Section 201 and Section 202 (c). The creation of the tenancy does not depend upon the

words employed. Brewer vs. Bowersox, 92 Md. 567; Safe Deposit & Trust Co. vs. Tait, 295 Fed. 429. Furthermore, he word "entirety" or entireties" is unknown in the law, when speaking of tenancies, except in relation to estates held by husband and wife. Thus, to place upon the language of the statute any other meaning than that such a tenancy held by a decedent and his wife was intended to be included, would be to say that Congress is not to be presumed to have used words in the only sense in which they are ever used. It is significant that in the 1924 and 1926 amendments to the Act, the words "any other person" are changed to "spouse,"—in short, a recognition of what has just been said. Where words upon their face are not ambiguous, it is not permissible to seek elsewhere for the will of the legislators. United States vs. Goldenberg, 168 U. S. 95; Caminetti vs. U. S., 242 U. S. 470; Thompson vs. U. S., 246 U. S. 547. It is true that the Court of Claims in Blount vs. U. S., 59 C. Cls. 328, involving a tenancy by the entireties in the District of Columbia, has expressed a very definite doubt as to the correctness of this consruction,—a case where, however, it was not necessary for the Court to decide the question, because the Court found that inasmuch as the tenancy, unlike that in the present case, had been created prior to the effective date of the Revenue Act of 1916, since that Act was not retroactive, the value of such interest should not be included in the gross estate of the decedent. The dictum of the Court on the precise point here at issue is as follows, (page 347):

"* * * We think it doubtful whether subdivision (c) of section 202 contemplates estates by the entirety in [fol. 11] their technical sense. It speaks of an interest held jointly, or as tenant in the entirety by the decedent, 'and any other person.' Only an estate held by the husband and wife could be held by the entirety. It seems to us this language applies to an interest that passes as part of the estate; that is, an estate held jointly or per my et per tout, by the moiety and by the whole."

Although the Blount case was appealed to the Supreme Court, it was dismissed on motion of the Government. (273 U. S. 769). This precise question appears never

to have been before the Courts in any other reported case, but has been before the Board of Tax Appeals, with respect to tenancies by the entireties in Maryland, and also in Missouri, New York and Pennsylvania, and in each instance the dictum of the Blount case was followed. Appeal of Susie M. Root, 5 B. T. A., Report 696; Appeal of James C. Murphy, 5 B. T. A. 952; Appeal of George R. Dyer, 5 B. T. A. 711; and Appeal of Providence Trust Co., 5 B. T. A. 1004.

We now turn to the second contention made by the administrators, namely, that if the Act is to be construed as embracing estates by the entireties, then it is unconstitutional. It is asserted that it is unconstitutional because (1) it is a direct tax upon property in violation of Section 2, Clause 3 and Section 9, Clause 4 of Article 1 of the Federal Constitution, which prohibit any direct tax unless apportioned among the several states according to population; and because (2) it takes property without due process of law in violation of the Fifth Amendment to the Constitution, in that by including tenants by the entireties, the Act provides for measuring the tax upon a decedent's estate by property which belongs to another, namely, to the surviving spouse, and for this reason is arbitrary and capricious. The pertinent provisions of the Act have been quoted in the first part of this opinion.

It is important to note at the outset that this Act of September 8th, 1916, Chapter 463, Title 2, Section 201, et seq. has been before the Supreme Court, and the constitutionality of its fundamental provisions and scheme of taxation upheld, the Court declaring that the estate tax thereby imposed is an indirect tax on the transfer of the net estate of every decedent, and as such does not require apportionment, nor is it an unconstitutional interference [fol. 12] with the right.. the states in regulating descent and distribution. N. Y. Trust Co. vs. Eisner, 256 U. S. 345. In other words, the Court merely affirmed what it had previously announced, that Congress may constitutionally levy excise taxes upon the transmission of property at death. Knowlton vs. Moore, 178 U. S. 41. In the Eisner case, however, the question before the Court involved a construction of the meaning of "charges against the estate" deductible under Section 203 of the Act, and the question now before this Court, namely, the validity of the attempt to include

estates by the entireties in a decedent's gross estate as provided in Section 202 (c), was not involved. Since a statute may be in part constitutional and in part unconstitutional, if the parts are not dependent upon each other, a consideration of this precise question is not precluded by anything which the Supreme Court has said with respect to other aspects of this particular statute. Pollard vs. Farmers Loan & Trust Co., 158 U. S. 601, 635; Llewellyn vs. Frick, 268 U. S. 238, 251, 252.

Taking up the first constitutional objection that is here raised with respect to the inclusion of tenants by the entireties, as part of the gross estate, in computing the tax, namely, that such cannot be done without apportionment because to tax such estates results in a direct tax, the basis of this argument is that property held by the entireties does not pass at death as by inheritance, but rather by survivorship and that, therefore, a tax thereon is a direct tax, in that it is laid upon the ownership of the property and not upon any transfer of rights acquired or passing at death.

In order to meet this argument, it is necessary at the outset to understand the exact nature of a tenancy by the entireties as such an estate is understood by the law of Maryland, for the construction which the Maryland Courts give to such tenancy is binding upon this Court in this proceeding. Clarke vs. Clarke, 178 U. S. 186.

Tenancies by the entireties are firmly established under the law of Maryland. The Maryland Court of Appeals, in the case of Marburg vs. Cole, 49 Md. 402, at 411, thus explains the history of these estates which Maryland inherited as part of the common law of England:

[fol. 13] "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants, nor are they tenants in common. They are, in the contemplation of the common law, but one person, and hence they take, not by moieties, but the entirety. They are each seized of the entirety, and the survivor takes the whole. As stated by Blackstone, "husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout, et non per my; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole

must remain to the survivor." 2 Blac, Com. 182. This has been the doctrine of the common law from an early period of his history, for we find the principle as stated by Blackstone laid down in Littleton's Tenures, Sec. 291, from whence it has been almost literally transcribed by all subsequent writers on estates. Co. Litt., 187; 2 Cruise Dig., 492; 1 Prest. Est., 131-2 4 Kent's Com., 362; 1 Washb. R. Pro., (4th Ed.) 672, and the authorities there cited."

Again in a later case, the Maryland Court of Appeals explained the peculiar nature of such estates, as follows (page 572, 573):

"It is not because a conveyance or gift is made to husband and wife as joint-tenants that the estate by entireties arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and since in the contemplation of the common law they are but one person, they take and can only take, not by moieties, but the entirety. The marital relation with its common law unity of two persons in one, gives rise to this perculiar estate when a conveyance or gift is made to them without restrictive or qualifying words; and they hold as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife. This estate with its incidents continues in Maryland as it existed at the common law. McCubbin v. Stanford, 85 Md. 390. It differs materially from all other tenancies. The right of survivorship, which is one of its chief incidents, can not be destroyed except by the [fol. 14] joint-act of the two; and upon the death of either the other succeeds to the entire property or fund. 2 Bl. Com., 182; Coke, Litt., 187A; Green v. King, 2 W. Bl. 1211; Hanan v. Towers, 3 Har. & J. 147." Brewer vs. Bowersox, 92 Md. 567, 572, 573.

The common law controlling this character of estate has never been changed in Maryland. This is true in a majority of the States. In others, as in England, it is regarded as abolished by married women's property acts. See Tiffany on Real Property, Vol. 1, Sec. 194, for a compilation of the law in the various jurisdictions. As late as 1918, in the case of Ades vs. Caplin, 132 Md. 66, at 69, we find the Mary-

land Court of Appeals again defining tenants by the entireties as follows:

"Tenants by the entireties are, in the contemplation of the common law, which is the law of this State, but one person, and hence they take, not by moieties, but the entirety. They are each seized of the entirety, and the survivor takes the whole. Marburg vs. Cole, 49 Md. 411."

See also McCubbin vs. Stanford, 85 Md. 378; Baker vs. Baker, 123 Md. 32. In accord with these State decisions, Judge Soper has thus denied a tenancy by the entireties in Safe Deposit & Trust Co. vs. Tait, supra, page 431:

"A tenancy by the entireties is created by a conveyance to husband and wife, whereupon each becomes seized and possessed of the entire state, and after the death of one, the survivor continues to take the whole. No special form of words need be used."

As we have seen, the Act imposes a tax on the transfer of the net estate of every decedent. We must, therefore, determine whether anything has been transferred to the surviving wife by reason of the death of the husband. Has any interest accrued to her which she did not previously have? There are two elements in every transfer of a decedent's estate: (1) exercise of the legal power to transmit at death, and (2) the privilege of succession. Both of these elements may be made the basis of taxation. Stebbins vs. Reilly, 268 U. S. 137. But the Act of 1916, now under consideration, purports to tax only the first of these elements. As was said by Chief Justice White, in Knowlton vs. Moore, supra, page 57:

"Confusion of thought may arise unless it be always [fol. 15] remembered, that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception unless the import of these words be accurately understood."

The administrators seek to prove that there has been no transfer from the husband to the wife in the present case

by the analogy of dower, pointing out that a wife's dower interest in her husband's estate has been held not to be subject to an estate tax under the Revenue Act of 1918. (There is no provision relating to dower in the Act of 1916.) Hibbard vs. Crooks, 25 F. (2d) 896; Monroe vs. U. S., 10 F. (2d) 230. In the first of these cases, the property in question was located in Missouri and in the second in Nebraska. In each case, the Court decided that since by the statutes and decisions of the given State, the inchoate right of the surviving spouse became absolute by operation of law, that is, an inchoate right was acquired by virtue of the marriage relation and became consummated on the husband's death, any attempt to tax the value of the interest of the surviving spouse amounted to the imposition of a direct tax and, therefore, was unconstitutional as being in violation of the apportionment provisions of the Federal Constitution. In the Hibbard case, the Court said, page 897:

"It will be observed that the tax imposed is "upon the transfer of the net estate of every decedent." The case entitled In Re: Rogers' Estate, 250 S. W. 576, was decided by the Supreme Court of the state of Missouri April 9, 1923. It was there held that "the wife's interest does not pass to her by will nor by the intestate laws, but it is hers, will or no will. * * * It is a right which she has in her husband's property by virture of the marriage relation." It is an inchoate right, which becomes consummate upon his death.

* * * * * * *

According to the law of Missouri, there existed during the marital relation an inchoate right, and such right became perfect upon the death of the husband. It was, therefore, never the property of the estate of the decedent."

[fol. 16] In the Monroe case, the Court said, page 231:

"By statutes and decisions of Nebraska the interest of the surviving spouse does not come to him through the death, either by inheritance or testamentary succession, nor as distributive share in the estate, but his inc*oh*ate right becomes absolute by operation of law. And this results the same, whether, as in this case, there is a will, which pur-

ports to give him the same identical interest which he would have had without it, or whether he exercises an election to take his sta-utory interest outside the will. In Re Sanford, 91 Neb. 752, 137 N. W. 864, 45 L. R. A. (N. S.) 236; In Re Strahan, 93 Neb. 828, 142 N. W. 678."

Without passing upon, because not before the Court, the precise point decided in the foregoing cases, it is sufficient to say that the law of Maryland with respect to dower is similar to that of the other States referred to. Is the analogy perfect? Are these cases controlling? Of course, the tenancy by the entireties, unlike a wife's inchoate right of dower, was not created by operation of law, but by the act of the parties themselves. There are other distinctions between the two interests. For example, whereas a court of Equity has no jurisdiction, merely at a husband's request, to direct the sale of his property, free from the wife's inchoate dower, such an interest, though capable of release, not being susceptible of sale or transfer or of being divested except with the wife's consent, nevertheless, a decree may in the discretion of the Court, sometimes be passed for the sale of property owned by the husband and wife as tenants by the entirety, even though one of them may oppose the sale. Roth vs. Roth, 144 Md. 553; Masterman vs. Masterman, 129 Md. 167. But fundamentally, in so far as the estate tax is applicable, are the two estates distinguishable on principle? We have described the peculiar nature of a tenancy by the entireties. Under it both the husband and wife are said to hold the entire title. When one dies, therefore, no new estate can be said to be conferred upon the survivor for the death simply destroys the possibility of the decedent's survivorship. The survivor takes nothing which he or she did not have before; acquires no new title but takes the whole by the original conveyance by which he [fol. 17] or she was invested with the entire estate. This is the reasoning adopted in the case of Blount vs. U. S., supra, which the administrators have stressed in support of their contentions and from which it seems pertinent here to quote as follows (pages 346, 347):

"If the estate of the husband and wife was tenancy by the entirety with all the incidents of such an estate at common law, then nothing was transferred to the wife by

the husband's will or by her mere survivorship because she took the entire estate under the original grant. See Palmer v. Mansfield, 222 Mass. 263; Matter of Lyon, 233 N. Y. 208; Brihl v. Martin, 263 Pa. 519. It was said in Hunt v. Blackburn, 128 U. S. 464, 469: "Undoubtedly, at common law, husband and wife did not take under a conveyance to them of land jointly, as tenants in common or as joint tenants, but each became seized of the entirety per tout et non per my—the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant." In express terms the tax is imposed by Section 201 upon "the transfer of the net estate of every decedent." See Woodward case, 256 U. S. 632. It is an estate tax, imposed not upon the gross estate but upon the net estate transferred, and rules for the ascertainment of the amount of this net estate are prescribed. See Woodward case, 56 C. Cls. 133, 150. In view of the plain language of the statute we need not consider the refinements as to "death duties" suggested by the Government's contention. In a late case it is said that what this law taxes is not the interest to which legatees or devisees succeeded on death, but the interest of the decedent which ceased by reason of his death. See Y. M. C. A. v. Davis, 264 U. S. 47. But this does not mean that the tax is upon an estate which ceases by reason of the death. It would hardly be contended that this statute imposes a tax on an estate for life held by one at the time of his death on the theory that the tax is upon an interest which ceases by reason of the death. It was said by Mr. Justice White, in Knowlton v. Moore, 178 U. S. 41, 57: "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of prop- [fol. 18] erty by death which is the subject levied upon by all death duties." The tax here is upon the transfer of an estate which passes from the decedent, and is not upon an estate which ceases with his death. See Knowlton v. Moore, supra; Lederer v. Northern Trust Co., 262 Fed. 52, 54; New York Trust Co. v. Eisner, 256 U. S. 345; Woodward case, supra. It follows that the tax should not be assessed against the estate of tenants by the entirety be-

cause the wife did not take as upon a transfer from the husband at his death, but took under the original grant, his estate ceasing."

The Government in its reply brief admits that in the case of a tenancy by the entireties, there is no actual transfer upon the death of either spouse since each owned the whole, but seeks to qualify and explain this admission by saying "it is equally true that in effect there accrued to the widow upon the decedent's death something which she did not have in his life time, namely, the unrestricted right to dispose of the whole property and give a good title thereto. The assignment which created the estate did not complete the transfer of the property. Subsequent events determined the respective interests therein. * * * In the instant case that which fixed the wife's right was the husband's death,—death completed the transfer. So that it is true, only in a highly technical sense, that nothing passed to the wife on the husband's death. The transfer thus completed by death is in the nature of a testamentary disposition. The purpose of creating an estate by the entirety is to secure the right of survivorship. That is, to direct the devolution of property at death. Therefore, when a person purchases property with his own money and transfers it to himself and his wife as tenants by the entirety, he in effect exercises the right of post mortem disposition and gives his wife the absolute title, contingent upon his death." The Court cannot agree with these last assertions because unable to concede that anything actually devolved from the husband upon the wife at the former's death. In one sense, it is true that upon the husband's death, the wife did acquire more than she had during his life time, namely, complete title in herself as sole owner as opposed to title to the whole jointly with her husband, but this is not tantamount to saying that she acquired this right from her husband. We must not lose sight of the clear object of the Act as the Supreme Court [fol. 19] has construed it, which is to tax the transfer of an estate which passes from the decedent, and is not to tax an estate which simply ceases with his death. As pointed out by the Court of Claims in the Blount case, it

is not logical to contend that this statute imposes a tax on an estate for life, held by a person at the time of his death, on the theory that the tax is upon an interest which ceases by reason of his death. He transfers nothing to the remainder-man, and so it is with respect to a wife's inchoate right of dower which becomes absolute upon her husband's death. By his death nothing is actually transferred to her. The law, itself simply consummates the inchoate right upon the husband's death.

The Court is, therefore, forced to the conclusion that the reasoning in the decision in the Blount case, as well as in the Hibbard and Monroe cases above referred to, is sound in its application to a tenancy by the entireties and therefore, should be followed. In the Nebraska case, an appeal was taken by the Government to the Supreme Court, which, however, was dismissed prior to hearing. The Missouri decision was not appealed.

In a recent decision by the Circuit Court of Appeals for the Ninth Circuit, Carter vs. English, 15 F. (2d) 6, the Court had under consideration this same section of the estate tax act in its application to a joint tenancy created under the law of California. Under that law as construed by the California Courts, just as at common law, the title to joint property under a joint tenancy is held not to pass to and vest in the survivor upon the death of his co-tenant but each tenant is seized of the whole estate from the first. No change occurs in his title on the death of his co-tenant but it simply "remains to him" and comes wholly from the original grant. The Court held that under a provision in a will giving property to testator's widow and daughter as joint tenants, on the death of the widow one-half of such property was not subject to the estate tax, saying, page 7, that to impose such a tax is "inconsistent with the status of the right as defined by the California Court." It is true that the joint tenancy was created before the passage of the Act and on the authority of Shwab vs. Doyle, 258 U. S. 529, the Court declined to give retroactive effect to the Act. However, the conclusions of the Court with respect to the [fol. 20] character of the estate sought to be taxed is very persuasive, even if taken as unnecessary to the decision in the case. The Court concludes its opinion with the fol-

lowing statement, page 8: "Our judgment is that the will gave to each tenant a present joint ownership in the whole property described in the will; *that there was no change of title, and no transfer by reason of the death of Annie Ames.*" (Italics inserted.)

It is to be noted that Section 202 (c) contains a proviso excepting from the operation of the tax such part of the interest included for the purpose of determining the value of the gross estate "as may be shown to have originally belonged *to such other person* and never to have belonged to the deceased." Since as we have seen, the peculiarity of a tenancy by the entireties is that the husband and wife are each seized of the whole estate, it can scarcely be said that this proviso was intended to or does relate to such a tenancy, because the result would be to exclude entirely from this section every tenancy by the entireties. This, the Court feels, is not a reasonable construction to be placed upon this section, in view of the fact that Congress saw fit to include the specific definition of such tenancies. The proviso obviously is intended to, and must relate to joint interests other than tenancies by the entireties as that term is uniformly understood in our law. This is confirmed by the fact that in 1924 this section was amended to read as follows; and has not been changed by an- subsequent amendment: "to the extent of the interest therein held as joint tenants by the decedent and *any other person*, or as tenants by the entirety by the decedent and *spouse*, or deposited with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to *such other person* and never to have been received or acquired by the *latter* from the decedent," etc. (Italics inserted.)

In reaching this conclusion the Court is not unmindful of the elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it, if the statute can be reasonably so construed. Harriman vs. Interstate Commerce Comm. 211 U. S. 407; U. S. vs. Delaware [fol. 21] & Hudson Co., 213 U. S. 366. But a Court is not

at liberty, in order to sustain a statute, to give it a forced construction, or to read into it and to interpolate words which do not appear in the language as enacted. Such the Court feels it would be doing in the present case if it should hold that the proviso in Section 202 (c) vitiates entirely the inclusion of tenancies by the entireties.

The Government in support of the constitutionality of the Act points out that the federal estate tax is not restricted to property which the decedent owned at his death and which is then transferred, and refers to that provision of the law Section 202(b) which taxes transfers made in contemplation of death; that this was done to prevent evasion and to give practical effect to the exercise of admitted power; and that by the same reasoning, if the value of a tenancy by the entireties is not to be treated as part of the estate of the tenant who dies first, then in those states where, as in Maryland, the common law estate of tenancy by the entireties exists as to both real and personal property, a husband and wife may cause all of the-r property to be transferred to themselves as tenants by the entireties and thereby enable the estate of the one dying first completely to escape estate taxes. But this is an argument based rather upon convenience than upon sound legal principles. In judicial interpretation of legislative acts, there is no place for the adage that "the wish is father to the thought." It is true, as the Supreme Court said, in Nichols vs. Coolidge, 274 U. S. 531, at 542, "undoubtedly, Congress may require that property subsequently transferred in contemplation of death, be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity." While from a practical point of view there is force in the Government's argument, in addition to what has already been said, it is sufficient to point that as the statute now stands a person, in his life time, has the absolute right to give any or all of his property away without being subject to the tax, provided such gift be not made in contemplation of, or intended to take effect in possession or enjoyment at or after death, but if the gift be consummated through the creation of a tenancy by the entireties and in fact made with such contemplation or intention, it would be taxable just the same [fol. 22] as though made in any other manner.

It follows that since the effect of Section 202(c) of the Act is to levy a direct tax upon the decedent's estate contrary to Article 1, Sections 2 and 9 of the Constitution, that Section is invalid in so far as it affects a tenancy by the entireties.

We now turn to the second and last constitutional objection, namely, that the tax in so far as it includes tenancies by the entireties, measures the tax upon the decedent's estate by property which belongs to another, namely, the surviving spouse and for this reason is arbitrary and capricious and in violation of the due process clause of the Fifth Amendment to the Constitution. From the conclusions just reached, the Court must hold that this objection is well taken and such being the case, there is ample authority for declaring Section 202(c) invalid on this ground as well as on the ground that it violates the other provisions of the Constitution hereinbefore named relating to direct taxation. As was said by the Supreme Court in Nichols vs. Coolidge, supra, page 542: "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. Brushaber v. Union Pacific R. R., 240 U. S. 1, 24; Barclay & Co. vs. Edwards, 267 U. S. 442, 450. See also Knowlton v. Moore, 178 U. S. 41, 77."

Verdict will, therefore, be entered for the plaintiffs in the sum of $3,337.67, together with interest at the rate of six percent per annum on said amount, from June 14th, 1921 to the date of judgment.

IN UNITED STATES DISTRICT COURT

VERDICT AND JUDGMENT

Whereupon, the issues joined as aforesaid between the parties aforesaid were tried before the Court without a Jury upon a stipulation of facts agreed upon by counsel, and the Court having considered same, doth find for the plaintiff and assess the damages of said plaintiff to the sum of Three Thousand Three Hundred Thirty seven dollars and sixty-seven cents, with interest at rate of six per cent per annum on said amount from June 14, 1921 to date of Judgment.

[fol. 23] MEMORANDUM

Verdict was rendered in the above entitled case on the 19th day of October, 1928, and Judgment on the 22nd day of October, 1928.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR SIGNING AND FILING BILL OF EXCEPTIONS—Filed November 15, 1928

Ordered, adjudged, and decreed by the United States District Court of the District of Maryland this 15th day of November, 1928, that the time for filing and signing bills of exceptions in the above entitled case be extended until and to include the 14th day of December, nineteen hundred and twenty-eight.

Morris A. Soper, United States District Judge.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR SIGNING AND FILING BILL OF EXCEPTIONS—Filed December 13, 1928

Ordered, adjudged, and decreed by the United States District Court of the District of Maryland this 13th day of December, 1928, that the time for filing and signing Bills of Exceptions in the above entitled case be extended until and to include the fourteenth day of January, nineteen hundred and twenty-nine.

William C. Coleman, United States District Judge.

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS—Filed January 7, 1929.

Be it remembered that the trial of the above entitled case was held on the second day of April, 1928, before the Honorable William C. Coleman, District Judge of the United States District Court for the District of Maryland, without

a jury, at Baltimore, Maryland, and in order to sustain the issue joining, the following stipulation of facts was filed:

[fol. 25] STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. That the plaintiffs are residents of the State of Maryland and are the duly qualified and acting administrators of the estate of James E. Tyler, deceased.

2. That said James E. Tyler, a resident of the State of Maryland, died at Baltimore in said State on May 7, 1918, intestate.

3. That pursuant to the provisions of the Revenue Act of 1916, as amended, the plaintiffs as said administrators on or about the 12th day of March, 1919 filed with the Collector of Internal Revenue for the District of Maryland a Federal estate tax return for the estate of said James E. Tyler, showing a net estate, for the purpose of the Federal estate tax, of $76,561.24, and a total tax of $2,062.45, which was duly paid by the plaintiffs as said administrators to the said Collector on March 14, 1919.

4. That subsequent to the filing of said return, the Commissioner of Internal Revenue, upon additional facts and information submitted to him, directed a review and audit of said return of the estate of the decedent, and as a result of such review and audit the net estate and taxes due thereon were found and determined to be as follows:

Gross estate	$265,662.30
Deductions	58,207.70
Net estate	$207,454.60
Estate tax	$8,447.28
Estate tax paid	2,062.45
Estate tax due	$6,384.83

[fol. 26] That the plaintiffs as said administrators paid said additional tax in the sum of $6,384.83 to the said Collector in May and June, 1921, together with interest in the sum of $502.65.

5. That in said review and audit the Commissioner of Internal Revenue included in the decedent's gross estate 373 shares of the capital stock of The Kimball, Tyler Company, of a determined value of $63,083.76. Said shares of stock had not been included in the estate tax return filed by the plaintiffs as said administrators.

6. That on or about the 28th day of February, 1924, the plaintiffs as said administrators filed with the said Collector a claim for refund in the sum of $2,076.00, on the ground among others that 24 shares of the capital stock of The Kimball, Tyler Company were improperly included in the gross estate, as said 24 shares had been given by the decedent to his son.

7. That on or about the 15th day of September, 1924, the plaintiffs as said administrators filed with the said Collector a claim for refund in the amount of $4,308.83, on the ground that 348 shares of the capital stock of The Kimball, Tyler Company, were owned by the decedent and his wife as tenants by the entirety, and under the decision in the case of Blount v. United States, (59 Ct. Cls. 328), the value of said shares was not subject to Federal estate tax.

8. That on or about the 4th day of August, 1925, the Commissioner of Internal Revenue allowed said claim for refund for $2,076.00 in the amount of $1,765.62, and rejected said claim for refund in the sum of $310.28, making certain adjustments not material to the issue in this case, and reducing the number of shares of The Kimball, Tyler Company stock to be included in the gross estate from 373 shares to 349 shares of a determined value of $59,183.42, and on the same day the Commissioner of Internal Revenue rejected said claim for refund in the amount of $4,308.83 in its entirety, on the ground that the value of 349 shares of the capital stock of The Kimball, Tyler Company was properly included in the decedent's gross estate; that a check was duly mailed to the plaintiffs as said adminis-

trators for $1,765.72 and $416.86 interest, or a total amount [fol. 27] of $2,182.58.

9. That at the death of the decedent he and his wife, Ida H. Tyler, were the owners of 349 shares of the capital stock of The Kimball, Tyler Company, a West Virginia corporation, doing business in the State of Maryland, the said stock standing on the books of the corporation in the names of "James E. Tyler and Ida H. Tyler as tenants by the entireties," and having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock.

10. That if the value of the said 349 shares of the capital stock of The Kimball, Tyler Company should not properly be included in the decedent's gross estate the plaintiffs as said administrators are entitled to recover in this action the sum of $2,971.76 and interest paid on said amount in the sum of $365.91, or a total amount of $3,337.67, together with interest at the rate of 6% per annum on the amount of $3,337.67 from June 14, 1921, to the date of judgment.

And thereupon no other evidence was offered and the Counsel for the defendant moved the Court as follows:

"Now comes the defendant and moves the Court for Judgment against the Plaintiffs, dismissing the Plaintiffs' petition filed herein and to recover from said plaintiffs the costs herein expended for the reason that there is not sufficient evidence to warrant judgment in favor of the plaintiffs."

Which motion the Court did not grant and to the Court's action in thus rejecting the defendant's motion, the defendant then and there excepted and now prays the Court to sign and seal this its first bill of exceptions.

William C. Coleman, United States District Judge.
(Seal.)

Second Bill of Exceptions

[fol. 28] The evidence and proceedings set forth in the aforegoing Bill of Exceptions which are herewith by refer-

ence incorporated as a part of this Bill of Exceptions as herein set forth at length, having been heard and the defendant offered the following request for findings of fact and conclusions of law:

"Now comes the defendant by its attorney, Amos W. W. Woodcock, United States Attorney, and requests the Court specifically to find the facts in this case as follows:

That the decedent and his wife, Ida H. Tyler, at the date of the decedent's death on May 7, 1918, were the owners of 349 shares of stock in The Kimball, Tyler Company standing on the books of the corporation in the names of 'James E. Tyler and Ida H. Tyder as tenants by the entirely', such stock having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock. The defendant requests the Court to find as a matter of law that the whole value of the said 349 shares of stock in The Kimball, Tyler Company was properly included in the decedent's gross estate under the provisions of Section 202 (c) of the Revenue Act of 1916, as amended."

which the Court did not grant. To the refusal of the Court to grant the above request, the defendant then and there excepted and prays the Court to sign and seal its Second Bill of Exceptions.

William C. Coleman, United States District Judge.
(Seal.)

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 7, 1929

Now comes he Appellant, the United States of America, by A. W. W. Woodcock, United States Attorney, and in connection with its appeal assigns that in the record proceedings and judgment aforesaid, manifest error has [fol. 29] intervened to the prejudice of the Appellant, to wit:

1. That the Court erred in ordering judgment in the sum of $3,337.67 to be entered in favor of the plaintiff in this Court and against the defendant.

2. That the Court erred in refusing to enter a judgment in favor of the defendant in this Court and against the plaintiffs in this Court.

3. That the Court erred in its opinion filed in this case on the nineteenth day of October, 1928, in ruling "It follows that since the effect of Section 202-C of the Revenue Act of September 8, 1916, is to levy a direct tax upon the decedent's estate contrary to Article I Sections 2 and 9 of the Constitution, that section is invalid in so far as it effects the tenancy by the entireties."

4. That the Court erred in ruling in the same charge that the said section of the law is invalid in so far as it includes tenancies by the entireties in that the section is arbitrary and capricious and in violation of the Fifth Amendment of the Constitution of the United States.

5. That the Court erred in ruling that the 349 shares of the capital stock of the Kimball-Tyler Company, a West Virginia corporation, of a determined value of $59,183.42, were unlawfully included in the gross estate of James E. Tyler, deceased, for the purposes of the Federal Estate Tax.

6. The Court erred in refusing especially to grant the defendant's formal motion for judgment.

7. The Court erred in refusing to grant the defendant's formal request for findings of fact and conclusions of law.

By reason whereof, the Appellant prays that the aforesaid judgment may be reversed.

A. W. W. Woodcock, United States Attorney.

[fol. 30] In United States District Court

Stipulation re Transcript of Record—Filed January 14, 1929

It is stipulated and agreed by the parties to this cause that the transcript of record of the appeal in the above entitled case to the United States Circuit Court of Appeals for the Fourth Circuit shall consist of the following:

1. Declaration

2. Pleas
3. Verdict and Judgment
4. Opinion of the Court
5. Petition and Order extending the time for filing Bills of Exception
6. Petition and Order extending the time for filing Bills of Exception
7. Defendant's Assignment of Errors
8. Defendant's Bills of Exception
9. Stipulation of Counsel as to making up record of appeal
10. Memorandum of the Clerk
11. Order of transfer record
12. Clerk's certificate

And it is further stipulated and agreed that the Clerk of this Court shall make a transcript of the record of this [fols. 31 & 32] case and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, to be printed in accordance with Rule 23 of the said Court.

J. Edward Tyler, Jr., Attorneys for the Plaintiff.
A. W. W. Woodcock, Attorney for the Defendant.

IN UNITED STATES DISTRICT COURT

MEMORANDUM RE APPEAL PAPERS

(1) Petition for Appeal, filed 7th January, 1929.

(2) Appeal granted, 7th January, 1929.

(3) Citation dated 7th January, 1929. (Service acknowledged 10th January, 1929.)

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be trans-

mitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste: Arthur L. Spamer, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2840

UNITED STATES OF AMERICA, Appellant,

versus

JAMES E. TYLER, JR. and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, Appellees

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

MINUTE ENTRIES

January 16, 1929, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of A. W. W. Woodcock, U. S. Attorney, and Eldon O. Hanson, Special Attorney, Bureau of Internal Revenue, is entered for the appellant.

January 26, 1929, the appearance of J. Edward Tyler, Jr., Frank S. Bright, and L. C. Connally is entered for the appellees.

[fol. 34] February 18, 1929, twenty-five copies of the printed record are filed.

Argument of Cause

April 23, 1929 (April term, 1929), cause came on to be heard before Waddill, Parker and Norcott, Circuit Judges, and is argued by counsel and submitted.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2840

UNITED STATES OF AMERICA, Appellant,

versus

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, Appellees

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

(Argued April 23, 1929. Decided July 1, 1929)

Before Waddill, Parker, and Northcott, Circuit Judges

OPINION—Filed July 1, 1929

[fol. 36] PARKER, Circuit Judge:

This is an appeal from a verdict and judgment rendered in favor of the administrators of James E. Tyler, deceased, who paid under protest a portion of the federal estate tax assessed against the estate which came into their hands and instituted suit to recover it back as allowed by statute. The portion of the tax disputed is that assessed against the estate because of including in the value thereof property which was held by decedent and his wife as tenants by the entireties, and which upon the death of decedent vested in the wife as sole and exclusive owner. The facts in the case are few and undisputed. In November 1917 decedent transferred 349 shares of stock in the Kimball-Tyler Company to himself and wife, creating therein under the laws of Maryland an estate by the entireties in their favor. On his death in 1918, his wife became vested under the Maryland law with the sole ownership of the shares of stock. The value of the stock was $59,193.42 and it was included for taxation as a part of the gross estate of decedent, the total of which was $207,454.60. The estate tax was increased by reason of its inclusion in the amount of $3,337.67.

The administrators contended that estates by the entireties were not embraced within the terms of the taxing stat-

ute, and also that, if the statute should be construed as embracing them, it would be void as violative of the provisions of the Constitution which require the apportionment of direct taxes and of the due process clause of the Fifth Amendment. The learned District Judge held that the terms of the statute required the inclusion of estates by entireties in the determination of the gross estate for the purposes of taxation, but that in so far as it did this it violated the provisions of the Constitution upon which the administrators relied.

We think that the learned Judge was correct in holding [fol. 37] that estates by the entireties were embraced within the terms of the taxing statute. See Revenue Act of 1916. 39 Stat. 756, 778. Section 201 of that act provided that a tax according to a graduated scale should be imposed upon the transfer of the net estate of every decedent dying after its passage, and that the value of the net estate should be determined as provided in Section 203. The latter section provided for the deduction of an exemption of $50,000 and certain other items from the value of the "gross estate." And Section 202 provided that the value of the "gross estate" should be determined by including the value at the time of the death of decedent of all property, real or personal, tangible or intangible, (a) to the extent of his interest therein at the time, (b) to the extent of any interest which he had transferred in contemplation of death, (c) and to the extent of the interest held jointly or as tenant by the entireties with another, the exact wording of clause c of Section 202 being as follows:

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The administrators rely upon the decision of the Board of Tax Appeals in the Appeal of Susie M. Root, 5 B. T. A. 696, and certain expressions in the opinion of the Court of Claims in Blount v. U. S. 59 Court of Claims 328, for the position that, as Section 201 of the statute imposes the tax upon transfers of the net estate, and as an estate by en-

tireties is not transferred to the surviving spouse, there was no intention to tax such an estate, and that the language in the statute must be held to be confined to joint tenancies. The answer to this, however, is that in Section [fol. 38] 201 the tax is imposed upon the transfer of the net estate as determined under subsequent provisions, and subsequent provisions require that estates by the entireties be included. The word "entirety" as applied to estates has had for centuries a well understood meaning in the law; and we must assume that Congress employed the language which it did in the light of that meaning. We attach no importance to the fact that the statute uses the language "tenants in the entirety" instead of the customary "tenants by the entirety." The same language appears in the Act of 1921, 42 Stat. 278, and it is worthy of note that it is referred to in the opinion of the Supreme Court in Reinecke v. Northern Trust Co. 278 U. S. 339, 49 Sup. Ct. 123, 126 as embracing an estate "by the entirety."

While it is true that an estate by entireties is vested in husband and wife at the time of the conveyance to them and that technically there is no transfer to the survivor when one of them dies, nevertheless, as a practical matter, there is a transfer to the survivor of all the rights which the decedent had in the estate, and Congress no doubt had this in mind in requiring estates by entireties to be included with the other property of decedent in determining the taxable value of his estate. Whether the vesting of the entire estate in the survivor be technically a transfer or not, Congress clearly intended that it should be treated as a transfer for the purpose of estate taxation. Joint tenancies and gifts made in contemplation of death were included. Why omit estates under which property could be jointly enjoyed by a man and his wife during their joint lives and, upon the death of one, inure to the sole benefit of the survivor? It is not reasonable to assume that, after being so careful about other matters, Congress would have left open so wide an avenue for evasion of the tax. We feel certain that it has not done so when the language used is given its reasonable interpretation.

[fol. 39] As the language of the act, therefore, requires that the value of estates by the entireties be included in the valuation of estates for the purpose of taxation, the only question that remains to be decided is whether Congress

had the power to make such requirement. We think that it had. No question is raised as to the general power of Congress under the Constitution to levy an estate tax, and none can be raised. Such a tax is not a direct tax requiring apportionment, but falls within the classification of "imposts, duties and excises" which Congress is authorized to levy by Section 8, Clause 1, of Article 1 of that instrument. Scholey v. Rew 23 Wall. 331; Magoun v. Illinois Trust etc. Bank 170 U. S. 283, 287; Knowlton v. Moore 178 U. S. 41; New York Trust Co. v. Eisner 256 U. S. 345; Chase Nat. Bank v. U. S. 278 U. S. 327, 49 Sup. Ct. 126. It is imposed, not on property, but on the privilege of transferring it, and is measured by the value of the interest transferred or which ceases at death. Y. M. C. A. v. Davis 264 U. S. 47; Chase Nat. Bank v. U. S., supra.

The statute, in so far as it requires the inclusion of estates by entireties in the valuation of the estates of decedents for purposes of estate taxation, is said to violate the Constitution because it is contended that in the case of an estate by the entireties there is no transfer to the survivor and consequently no basis for the imposition of an estate tax, and from this it is argued that the tax must be considered as a direct tax upon the property itself. We think, however, that this gives too narrow a meaning to "transfer" and ascribes too much importance to what are pure fictions of the law. It is true that husband and wife are said to be seized of the estate by entireties "per tout et non per my," that is to say, each during their joint lives is deemed seized of the whole estate and not of a moiety thereof; and it is true that, upon the death of one, the survivor is said to take no new interest because originally [fol. 40] vested with the entirety. But these doctrines are pure fictions based upon the fiction of the unity of husband and wife. Marburg v. Cole 49 Md. 402, 33 Am. Rep. 266; Ades v. Caplan 132 Md. 66, L. R. A. 1918D, 276. As a matter of fact, husband and wife are not one person but two persons, and neither has absolute right in or control over the property so long as the other lives. Only upon the death of one does the other acquire absolute ownership with the right to sole and unrestricted use and possession and the right to alien and convey. Whatever form of technical

expression be used, therefore, and whatever sophistries indulged, the fact remains that, upon the death of one of the parties, the survivor by operation of law succeeds to the interest which the decedent had in the property. As said by the Court of Appeals of Maryland in Brewer v. Bowersox 92 Md. 567, 572, 573, 48 Atl. 1060, 1062, "The right of survivorship, which is one of its chief incidents, cannot be destroyed except by the joint act of the two; and upon the death of either the other *succeeds* to the entire property or fund." (Italics ours). It is the transfer of interest involved in this "succession" which is the basis of taxation under the statute.

We see no reason why the casting of the entire estate upon the survivor, which takes place by operation of law in case of the death of one of the tenants by entireties, cannot be made the basis of taxation as well as the casting of succession upon the heir, which takes place in the case of intestate succession. The surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other; and in both cases it comes by operation of law. As stated above, it is no answer to say that because of the unity of husband and wife the survivor has, after the death of the other, what he has always had; for, as we have seen, the interest of the deceased spouse, from a practical standpoint, has been vested by law in the survivor. So long as [fol. 41] both are living, neither can convey the property without the joinder of the other. Neither is entitled to use and enjoy it to the exclusion of the other. Neither has any right in it beyond his own life unless he survives the other. If the parties should be divorced, the estate would be dissolved, and neither would succeed to the whole property even if he should survive. Upon the death of one of the parties, however, all of his rights in the property are by operation of law transferred to the other so as to create a sole and unconditional estate therein. To deny that there is a transfer of property in such case resulting from death, is to lose the substance of legal rights while grasping at the shadow.

What we have said answers the contention that the statutory provision violates the due process clause of the Fifth Amendment. This contention is based upon the theory that the statute, in so far as it includes tenancies by the entire-

ties, measures the tax upon decedent's estate by property which belongs to another. But, as we have seen, the property does not belong to the other in the sense of his having unconditional and sole ownership thereof until the death of decedent.

In the recent case of Chase Nat. Bank v. U. S., supra, the Supreme Court considered whether it was proper to include insurance policies within the taxable estate as required by the statute. The contention was made there, as here, that the interest of the beneficiary had vested prior to the death of insured and that consequently there was no transfer to be taxed, but the Court held that the policies should be included. The question in the case was stated as follows:

"It is true, as emphasized by plaintiff, that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death and that the proceeds of the policies came to the beneficiaries, not directly from the decedent, but from the insurer. But until the moment of death the decedent retained a legal interest in [fol. 42] the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled."

And, answering the question thus propounded, the Court said:

"Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax."

There can be no question in this case that we have the termination of the power of decedent over the property, and that this inures to the benefit of the surviving spouse,

whose ownership prior to the death of decedent was subject to the rights of decedent therein. And there can be no question, also, that we have a "shifting of the economic benefits of property which is the real subject of the tax". As said in Nichols v. Coolidge, 274 U. S. 531, 541, "Taxes are very real things and statutes imposing them are to be estimated by practical results."

We have carefully considered the cases which have reached a different conclusion, but, with great respect to the tribunals which rendered them, we do not think that they are sound. We have likewise considered the District Court cases relating to the validity of the statute requiring that the value of the widow's dower be included in the value of the estate for the purpose of taxation. Without passing [fols. 43 & 44] upon that question, which is not before us, it is worthy of note that the Circuit Court of Appeals of the Eighth Circuit has decided that the value of dower allotted under the Nebraska statute should be included in the valuation of the estate. Allen, Collector, v. Henggeler (C. C. A. 8th) 32 Fed. (2d) 69.

For the reasons stated, we think that the learned Judge below erred in holding that the provision of the statute in question was violative of the Constitution. The judgment in favor of the administrators will accordingly be reversed and the case will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

[fol. 45] In United States Circuit Court of Appeals, Fourth Circuit

No. 2840

United States of America, Appellant,

vs.

James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, Deceased, Appellees

Appeal from the District Court of the United States for the District of Maryland

Judgment—Filed and Entered July 6, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Maryland, at Baltimore, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

July 6th, 1929.

John J. Parker, U. S. Circuit Judge.

[fol. 46] In United States Circuit Court of Appeals

Minute Entries

On another day, to-wit, August 6, 1929, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Baltimore, Maryland, in due form.

Same day, the original petition for appeal, and order allowing appeal are returned to the Clerk of the District Court at Baltimore, Maryland.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] Supreme Court of the United States

Order Allowing Certiorari—Filed November 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,559. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 428. James E. Tyler, Jr., and William G. Tyler, administrators of the estate of James E. Tyler, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed October 4, 1929. File No. 34,559.

FILE COPY

OCT 4 1929
CHARLES ELMORE CROP
CLER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANK S. BRIGHT,
Counsel for Petitioners.

H. STANLEY HINRICHS,
BRIGHT, THOMPSON, HINRICHS & WARREN,
Of Counsel.

(34,559)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, deceased, respectfully pray for a writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above entitled cause on July 6, 1929.

A.

Summary Statement of the Matter Involved.

1. *Questions Presented.*

The questions presented are whether section 202 of the Revenue Act of 1916 requires that there be included as a part of decedent's estate, for federal estate tax purposes, the value of property which at the time of the decedent's death was held by him and his wife (surviving him) as tenants by the entireties, and, if so, whether Congress had the power to require the inclusion of the value of such property in the amount of the decedent's gross estate.

2. *The Facts.*

The facts are not in dispute and the case was submitted to the District Court upon an agreed statement of facts (R. 25). So far as material to the issue involved, the facts are as follows:

James E. Tyler, a resident of the State of Maryland, died in said State on May 7th, 1918, intestate, and the appellants were duly appointed administrators of his estate and are now acting as such. At his death, the decedent and his wife were the owners of three hundred and fifty shares of the common stock of the Kimball-Tyler Company, a West Virginia corporation doing business in Maryland, the stock standing on the books of the corporation in the names of "James E. Tyler

and Ida H. Tyler, as tenants by the entireties," having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock, which at his death was valued at $59,193.42, and said sum was included by the Commissioner of Internal Revenue as a part of his gross estate in computing the estate tax liability under the Revenue Act of 1916, thereby increasing said tax in the amount of $3,337.67. A claim for refund was seasonably filed and, upon its rejection, the administrators of the estate entered suit for recovery of this amount of the tax in the United States District Court for the District of Maryland (R. 1).

The United States filed two pleas in the District Court (R. 7) and upon issues joined (R. 8), trial was before the Court without a jury and verdict and judgment for the amount claimed were rendered for the taxpayer (R. 22-3). The Court rendered an opinion in the case in which it was held that Section 202 (*c*) of the Revenue Act includes estates by the entireties, but since the effect of said Section 202 (*c*) of the act is to levy a direct tax upon decedent's estate contrary to Article I, Secs. 2 and 9 of the Constitution, said section 202 (*c*) of the Revenue Act of 1916 is invalid insofar as it affects a tenancy by the entireties; and that the tax in this case, insofar as it includes tenancies by the entireties, measures the tax upon decedent's estate by the property which belongs to another, namely the surviving spouse, and for this reason is arbitrary and capricious and in violation of the due

process clause of the Fifth Amendment to the Constitution (R. 8-22). The Circuit Court of Appeals reversed the judgment (R. 41) and rendered an opinion in which it was held that Congress intended to tax tenancies by the entireties and such a tax was not in violation of the Constitution or the Fifth Amendment thereof (R. 34). This judgment was entered July 6th, 1929. The said opinion of the judges of the Circuit Court of Appeals has not yet been reported. The decision of the United States District Court is reported in Fed. (2d) page 887.

Reasons for the Allowance of the Writ.

1. Because the case involves an important question of Federal tax which has not been, but should be, settled by this court.

2. Because the provision of the Revenue Act of 1916, the unconstitutionality of which is involved in this case, is continued in corresponding sections of all subsequent Revenue Acts.

3. Because the decision of the Circuit Court of Appeals in this case is in conflict with a rule of property which is the settled law of the State of Maryland, of which the decedent was a citizen at the time of his death, and where the property which was the subject of the tax was located.

4. Because the decision of the Circuit Court of Appeals in this case is inconsistent with the decision by this Court in the case of Reinecke *vs.* Northern Trust Co. (278 U. S. 339) and is bottomed upon an erroneous

interpretation of this Court's holding in the case of Chase National Bank *vs.* United States (278 U. S. 327), which interpretation by the Circuit Court of Appeals is not warranted by the decision and is irreconcilable and utterly inconsistent with this Court's holding in the said case of Reinecke *vs.* Northern Trust Co.

WHEREFORE your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2840, The United States of America, Appellant, versus James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, Deceased, Appellee, and that the said judgment of the Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JAMES E. TYLER, JR., AND
WILLIAM G. TYLER,
Administrators of the Estate of
James E. Tyler, Deceased,

By FRANK S. BRIGHT,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, entered July 6, 1929 (R. 34), has not been officially reported.

II.

Jurisdiction.

The petitioner seeks a review under the provisions of the Act of February 13, 1925, Chapter 229, Section 1; 43 Stats. 938; U. S. C. Title 28, Section 347. The application for, and the allowance of, the writ is sanctioned by the holdings of this Court in many cases involving the construction and interpretation of the United States Revenue Laws. The most recent of these cases is: Reinecke *vs.* Northern Trust Company, 278 U. S. 339.

III.

Statement of the Case.

A full statement of the case has been set out under the heading "A," in the petition, and in the interest of brevity is not repeated at this point.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that that imposition of an estate tax upon the estate of a decedent which included the value of the interest held jointly by himself and spouse (who survived him) as tenants by the entireties did not amount to the imposition of a direct tax in violation of Article I, Section 2, and Article I, Section 9, of the Constitution of the United States.

2. The Circuit Court of Appeals erred in finding and holding that said tax did not amount to confiscation of property in violation of the due process clause of the Fifth Amendment of the Constitution, inasmuch as the said tax is measured by the value of the interest of the surviving tenant as well as that of the deceased tenant by the entireties.

3. The Circuit Court of Appeals erred in finding and holding that Section 202 (*c*) of the Revenue Act of 1916 insofar as it includes tenancies by the entireties is valid.

4. The Circuit Court of Appeals erred in rendering a judgment in favor of the respondent in this Court and against the petitioner.

5. The Circuit Court of Appeals erred in refusing to enter a judgment in favor of the petitioner in this Court and against the respondent.

6. The findings and judgment of the Circuit Court of Appeals in this case are based on a wholly erroneous conception of the law and said court misapplied and misinterpreted the applicable decision of this Court.

Argument.

The Statutes involved are as follows:

Title II of the Revenue Act of 1916 (39 Stats. 756) provides, so far as pertinent to this case:

> "SEC. 201. That a tax (hereinafter in this Title referred to as the tax), equal to the fol-

lowing percentages of the value of the net estate, to be determined as provided in Section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *

"SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property; real or personal, tangible or intangible, wherever situated:

"(*c*) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. * * *

"SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(*a*) In the case of a resident by deducting from the value of the gross estate.

"(1) Such amounts for funeral expenses, * * * and

"(2) An exemption of $50,000."

The above provisions, with minor changes which are not material, are continued in the Revenue Acts of 1918, and 1921 as Sections 401, 402, and 403 and in the Revenue Acts of 1924 and 1926 as Sections 301, 302 and 303.

Because of the fact that a tenancy by the entirety or by the entireties is a peculiar estate and exists only in

the case of husband and wife and it is inaccurately described in the law, it has been questioned whether Congress ever intended to include tenancies by the entireties in the above provisions. See *Blount vs. United States,* 59 Ct. Cl., 328. In the Revenue Acts of 1924 and 1926 the language of the provision was changed so as to read—"or as tenants by the entirety by the decedent and spouse."

The Commissioner of Internal Revenue has always claimed that the original provision contemplated the taxing of estates by the entireties and both the District Court and Circuit Court of Appeals for the Fourth Circuit in this case concurred in said holding. In this brief it is assumed that such was the intention of Congress.

Summary of Argument.

POINTS A-C. By the common law, a surviving tenant by the entireties takes by virtue of the original grant or devise, and does not take a new or additional interest by virtue of survivorship, nor does he take by descent or distribution. Therefore there is no transmission or transfer of any interest in property upon the death of a tenant by the entireties. Such is the settled rule of law in Maryland, and it is binding upon the federal courts in determining the effect of the succession to the interest of a deceased tenant by the entireties in that State.

POINTS D and E. Inasmuch as there is no transfer of any interest in property by the death of a deceased tenant by the entireties, the provision of the Internal

Revenue Act of 1916 is unconstitutional, which levies a tax upon the estate of a deceased tenant by the entireties based upon the interest held by himself and cotenant, because such a tax would be a direct tax. Moreover, inasmuch as said provision measures the tax by the value of the interest of the survivor as well as the interest of the decedent, the tax is capricious and arbitrary and amounts to confiscation in violation of the due process clause of the 5th Amendment of the Constitution.

POINTS F and G. The decision of the Circuit Court of Appeals in this case holding that such a tax is an indirect tax and within the power of Congress is contrary to decisions of this Court and other federal and state courts.

POINT A.

Under the common law there is no transfer of title or interest in property upon the death of a tenant by the entireties.

The decision of the Circuit Court of Appeals in this case is based upon the theory that because the tenants by the entireties were two separate individuals, there was in fact and in law a transfer upon the death of one of the tenants to the survivor because

> "Whatever form of technical expression be used the fact remains that, upon the death of one of the parties the survivor by operation of law succeeds to the interest which the decedent had in the property" (Record 38).

On the contrary, it is an established principle of the common law, which has been recognized by this court, that in fact and in law there is no transfer of title or of interest upon the death of a tenant by the entireties to the surviving tenant.

> "The survivor takes by virtue of the original grant or devise; he does not take a new or additional interest by virtue of survivorship, nor does he take by descent or intestate distribution."
>
> 30 C. J. 571;
> *Hunt vs. Blackburn*, 128 U. S., 464, 469;
> *U. S. vs. Robinson*, 183 Fed. Rep., 711;
> *Hupfel's Sons vs. Getty*, 299 Fed. Rep., 939;
> *Biehl vs. Martin*, 236 Pa., 519;
> *Palmer vs. Mansfield* (Mass.), 110 N. E. 283;
> *Matter of Klatzl*, 221, N. Y., 83.

There are no decisions of this court to the contrary effect, and as shown elsewhere in this brief (Point D), the test of the power of Congress is whether there was the power of transmission or transfer from the dead to the living of an interest in property; because it is that privilege or right which the State may change at any time and, therefore, may tax. Where there is no privilege there is no transfer and where there is no transfer there can be no tax. As stated by this court in the opinion in the case of *Nichols vs. Coolidge*, 274 U. S., 531, 541.

> "Congress may lay an excise upon the transfer of property reckoned upon the value of the

interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

POINT B.

It is a settled rule of property in the State of Maryland that there is no transfer of any interest in property by the death of a tenant by the entireties.

In the case of *Marbury vs. Cole*, 49 Md. 402, 411, it was held that:

> "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants nor are they tenants in common. They are in the contemplation of the common law, but one person and hence they take not by moities but by the entireties. They are each seized of the entirety and the survivor takes the whole. As stated by Blackstone, 'husband and wife being considered as one person in law, they cannot take the estate by moities but both are seized of the entireties, *per tout, etnon per my;* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor. 2 *Blac. Comm.* 182. This has been the doctrine of the common law from an early period of its history for we find the principle as stated by Black-

stone laid down in *Littleton's Tenures, Section* 291, from whence it has been almost literally transcribed by all subsequent writers on estates. See *Co. Litt.* 187; 2 *Cruise Dig.*, 492; 1 *Prest. Est.*, 131-2; 4 *Kent's Comm.*, 362; 1 *Wshb. R. Prop.* (4th *Ed.*), 672, and the authorities there cited."

See also

Brewer vs. Bowersox, 92 Md., 567;
McCubbin vs. Stanford, 85 Md., 378;
Baker vs. Baker, 123 Md., 32;
Ades vs. Caplin, 132 Md., 66.

In Maryland there may be a tenancy by the entireties in personal property as well as real property. *Brewer vs. Bowersox, supra; Baker vs. Baker, supra.*

Under the decisions of the Courts of Maryland neither tenant can mortgage nor convey any interest in an estate by the entireties without the consent of the other tenant. *McCubbin vs. Stanford, supra.*

The property would not pass to a tenant's trustee in bankruptcy.

Frey vs. McGaw, 127 Md., 23;
Ades vs. Caplin, supra.

In the case of *Ades vs. Caplin, supra,* the court (at page 69) stated:

"The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife, without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all

prejudice, such estate to any greater extent than if it vested in the wife exclusively in her own right. He has no such estate as he can dispose to the prejudice of the wife's estate. The unity of the husband and wife as one person, and ownership of the estate by that person, prevents the disposition of it otherwise than jointly."

A judgment against one tenant does not affect the property.

Jordan vs. Reynolds, 105 Md., 288.

POINT C.

Inasmuch as the nature and incidents of an estate by the entireties constitute a rule of property under the law of Maryland, such rule is binding upon the Federal courts in determining the effect of the succession to the interest of a deceased tenant by the entireties in Maryland.

Congress cannot declare that there is a transfer from a deceased tenant to the surviving tenant by the entireties in Maryland where the State law says there is none, without modifying the State law to that effect. Congress cannot create a transfer merely for the purpose of imposing a tax thereon where under the law governing the transaction, there is no transfer.

In the case of *Edward Hines, Yellow Pine Trustee, vs. Martin, et al.*, 268 U. S. 458, at page 464, Mr. Justice Stone, speaking for this Court, stated:

"To avoid the uncertainty and injustice which result from the 'discordant elements of a substantial right which is protected in one set of courts and denied in the court with no superior to decide which is right' (Brine *vs.* Insurance Co., 96 U. S. 627) this Court has not hesitated when there has been a conflict of decisions between it and the State Court effecting a rule of property within the State, to overrule its own decisions and to follow the State decisions, once it has become evident that they have established a 'rule of property' as a settled law of the State."

See also

Clarke vs. Clarke, 178 U. S., 186;
Warburton vs. White, 176 U. S., 484;
U. S. vs. Title Insurance & Trust Co., 265 U. S., 486.

POINT D.

In so far as Section 202 (c) of the Revenue Act of 1916 attempts to tax the interest of a tenant by the entireties it is a direct tax upon the property itself, and in violation of Act I, Sections 2 and 9, of the Constitution.

One of the absolute rights inherent in every citizen is that of property; it consists in the free use, enjoyment and disposal of all of his acquisitions without any control or diminution save only by the laws of the land.

1 *Blackstone Commentaries*, 138;
Buchanan vs. Worley, 245 U. S. 60, 74.

A tax upon any essential element of ownership is a tax upon the ownership of property and therefore a tax upon the property itself because property is in reality nothing more or less than those elements which the law has always recognized as attaching to the owner of a thing.

Thus, in *Brown vs. Maryland*, 12 Wheat., 419, it was held that a tax on the sale of an article imported only for sale is a tax on the article itself.

See also

Welton vs. Missouri, 91 U. S., 275;
Cooke vs. Pennsylvania, 97 U. S., 566;
Nicol vs. Ames., 173 U. S., 509.

In *Pollock vs. Farm Loan & Trust Company*, 157 U. S., 429, it was held that a tax upon income derived from rents or profits or income of real or personal property was a tax upon the property itself.

Taxes upon property are direct taxes and must be uniform and be apportioned among the several States according to their respective numbers.

The difference between a transfer of property *inter vivos* and the succession of the property of a decedent under the testamentary or intestary laws is fundamental. When a person dies he ceases to exist in law under the theory of the common law and a "thing" which during his lifetime was his "property" upon his death loses its characteristics as property because there is no one in whom his rights of property inhere. The State, therefore, designates by statute some per-

son in whom the right of property shall vest and the rights of persons to succeed to the property rights of a decedent are statutory. Such a transfer is not an inherent property right but is granted to whomever the State may choose to designate and it is therefore a right or privilege subject to the superior rights of the State.

It therefore logically follows that while a transfer of property between living persons cannot be taxed without taxing one of the rights which comprise the general ownership of property, which would be a tax upon the property itself, on the other hand a tax upon the transfer of or succession to the property of a decedent is a tax upon the privilege or right created by statute, which the State may change at any time.

A tax upon the transfer or transmission of property upon the death of a person has been held to be a tax upon such privilege or right of transfer, and such a tax is held to be an indirect tax within the meaning of the Constitution of the United States.

Plummer vs. Coler, 178 U. S., 115;
Murdock vs. Ward, 178 U. S., 139;
Knowlton vs. Moore, 178 U. S., 41.

In the case of *Knowlton vs. Moore, supra*, in which the late Chief Justice White delivered the opinion of the court, it was shown that in this and other countries, so-called death duties, estate taxes, legacy taxes and inheritance taxes, all "rest in their essence upon the principle that death is the generating force from which the particular taxing power takes its being, and

that it is the power to transmit, or the transmission from the dead to the living on which such taxes are more immediately rested."

With the above principles of law in mind it is perfectly clear that insofar as Sections 201-203 of the Revenue Act of 1916 attempts to tax the estate of a decedent upon the value of any property which he held as a tenant by the entireties it is a direct tax, and in violation of the Constitution of the United States because as shown elsewhere in this brief (Points A and B), the decedent never had more than a life interest in the property unless he survived his cotenant. His interest was one to which the privilege or right of disposition at his death never attached. It was only the right or privilege of transmitting the interest of the decedent's property upon his death which Congress had the power to tax, and inasmuch as he lacked any such privilege or right with respect to his interest in an estate by the entireties, there is nothing to which the tax can attach. The rights of a tenant by the entireties are only such as would obtain if the State had never granted any right or privilege of transmitting the property upon the death of a person.

Point E.

The tax is an arbitrary tax and in violation of the Fifth Amendment of the Constitution.

Section 202 (*c*) of the Revenue Act of 1916 levies a tax upon the estate of one tenant by the entireties measured by the value of the entire property held by

both tenants by the entireties "except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

It will be noted that the provision taxes as a transfer upon the death of a tenant by the entireties and as a part of his estate, *not* his interest which terminated at his death and which of course was not transferred, but the tax is levied upon the entire property. In other words, the statute levies the same tax that would have been levied if he had been the sole owner of the entire property during his life with the right to dispose of same at his death. It taxes the adverse interests in the property of the cotenant. Yet the fact is that from the creation of the estate, the surviving tenant became entitled to the same interest in the property as the decedent during his lifetime and also to the right of survivorship upon his death. Surely it is inescapable that by this statute the estate of the deceased tenant is taxed upon the property of the surviving tenant and it is, therefore, an arbitrary tax. The tax is so arbitrary and capricious as to amount to confiscation and is in violation of the Fifth Amendment of the Constitution. See *Brushaker vs. U. P. R. Co.*, 240 U. S., 1, 24; *Barclay & Co. vs. Edwards*, 267 U. S. 442, 450. In the case of a decedent owning no property whatever at the time of his death except his interest in an estate by the entireties, if his estate is taxable upon the value of that property no tax could be collected without recourse to the property belonging exclusively to the surviving tenant.

Point F.

The decision in this case is inconsistent with the decision of this Court in the case of Chase National Bank vs. United States, 278 U. S., 327, and is irreconcilable with the decision of this Court in the case of Reinecke vs. Northern Trust Company, 278 U. S., 339.

The holding of the court below is to the effect that there was a transfer upon the death of the decedent of all his interest in an estate by the entireties to the surviving tenant, by operation of law, is apparently bottomed upon the court's interpretation of the decision of this court in the case of *Chase National Bank vs. United States,* whereas a proper understanding of the decision of this court in the *Chase National Bank case* lends no support whatever to the decision of the court below in this case.

In the *Chase National Bank case* the decedent had the power to change at any time prior to his death the name of the beneficiary under certain insurance policies upon his life, and this Court held that the interest in the policies retained by the decedent was so great that the transfer to the beneficiaries was not completed until the death of the decedent when the power of control was terminated, and that the power of control or the power to direct the further enjoyment or possession of property after death may be considered tantamount to its exercise and therefore constitutes a taxable transfer. The devolution of the property after the death of the tenant was in accordance with his will because

he could have made a different disposition of it at his death. In that sense the decedent transmitted the property upon his death.

The element of power to control the disposition of the property after death, which was the privilege or right held to be taxable in the *Chase National Bank case*, is entirely lacking in the case of the death of a tenant by the entireties. In the latter case there is no power to change or revoke the right of survivorship, which existed in the cotenant from the very inception of the estate. In the case of a tenancy by the entireties the deceased tenant did not during his lifetime have any power to sell, mortgage, or dispose of any part of the property. He could not in any way prejudice the interest of his cotenant and he was without any power whatever to change in any way the right of survivorship which existed in the cotenant. Is it to be believed that if the decedent in the *Chase National Bank case* had been so circumstanced with reference to the insurance policies which were the subject of that suit that the court would have held that there was a taxable transfer to his estate?

See *Lewellyn vs. Frick*, 298 Fed. Rep., 803.

The construction adopted by the court below in this case of the language of this court in the *Chase National Bank case* is utterly irreconcilable with the decision of this court rendered on the same day in the case of *Reinecke* vs. *Northern Trust Company*, 278 U. S., 339. In that case the decedent during his lifetime had created seven separate trusts. In two of the trusts he reserved the income to himself for his life and after his death

the income was to be paid to certain other beneficiaries until the termination of the trust when the estate went to remaindermen. In each of these two trusts the decedent had reserved the power to revoke, alter or modify the trusts. In each of the five remaining trusts the decedent had also reserved a power to alter, change or modify the trusts, but said power could not be exercised without the consent of the single beneficiary in four cases and the consent of the majority of the beneficiaries in the fifth case. The decedent died without exercising any of the powers reserved under any of the trusts, and the question before the court was whether or not transfers had taken place which were the subject of the federal estate tax law. This court held that in the case of the two trusts in which the decedent had reserved the exclusive power of revocation a transfer had been effected at the time of his death, because until that time the gift had not been complete and the decedent had the right and privilege by revocation to change the disposition of the trusts upon his death. In the case of the five remaining trusts, however, in which the decedent did not have the exclusive power of revocation it was held that no transfer took place at the time of his death and the court, speaking by Mr. Justice Stone, gave the following as the reason:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial and consequently adverse interest, the trust for all practicable purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute" (pg. 125).

It was the lack of exclusive control by the decedent of the disposition of the property after his death which moved this court to hold that there was no transfer upon which the tax could be predicated in the case of the five trusts in the *Reinecke case*. It is manifest that if there had not been such exclusive control of the future disposition of the property covered by the insurance policies in the *Chase National Bank case*, decided on the same day, the court would have held in the *Chase National Bank case* that there was no taxable transfer. Neither case therefore supports the decision of the court below in this case, because in both cases before this court the taxable interest was the exclusive power in the decedent to direct the devolution of title, whereas in the case of a tenancy by the entireties neither tenant has at any time the power to revoke or defeat the other tenant's interest in the property, and the death of one tenant does not give to the surviving tenant anything more than what that tenant had under the original grant. Death simply destroys the interest of the deceased tenant. In this case deceased tenant's interest was not transferred at his death, but merely ceased at his death and that is all that he ever had unless he survided his contenant. Therefore there was no interest transferred at his death which can be properly included in the value of his estate.

Point G.

The question involved in this case has been decided by several tribunals inferior to this Court and always contrary to the decision of the court below in this case.

Thus, the U. S. Board of Tax Appeals has decided that the value of property held by a decedent as a tenant by the entireties should not be included as a part of the gross estate of the decedent for Federal estate tax purposes in the following cases:

> *Appeal of Dyer*, 5 B. T. A., 711;
> *Appeal of Murphy*, 5 B. T. A., 952;
> *Appeal of Provident Trust Co.*, 5 B. T. A., 1004;
> *Appeal of Girard Trust Co.*, 10 B. T. A., 1100 (now pending on appeal before the U. S. Circuit Court of Appeals for the Third Circuit).

The case of *Provident Trust Co.*, referred to above, was subsequently taken to the U. S. District Court for the Eastern District of Pennsylvania, which court reached the same conclusion as the Board of Tax Appeals, and the case is now pending before the U. S. Circuit Court of Appeals for the Third Circuit.

The U. S. District Court for the Middle District of Pennsylvania has reached the same conclusion in the case of *Dime Trust & Safe Deposit Co., Executor, vs. Phillips*, 30 Fed. (2d), 395.

The U. S. Court of Claims reached the same conclusion in the case of *Blount vs. United States*, 59 Ct. Cl., 328. The United States Circuit Court of Appeals for the 9th Circuit likewise came to the same conclu-

sion with reference to the estate of joint tenancy in California in the case of *Carter vs. English*, 15 Fed. (2d), 6. In both these cases, however, the estates were created prior to the Revenue Act of 1916 and it was also held that said act was not retroactive.

Conclusion.

It is therefore respectfully submitted, that in so far as the Revenue Act of 1916, Section 202 (*c*), intends to include for Federal estate tax purposes in the gross estate of the decedent, property held by decedent and his wife by the entireties, it is beyond the Constitutional powers of Congress; and, therefore, this case is one calling for the exercise by this Court of its supervisory powers, and to that end a writ of certiorari should issue and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

vs.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF BY PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

FRANK S. BRIGHT,
Counsel for Petitioners.

H. STANLEY HINRICHS,
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(34,559)

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SUPPLEMENTAL BRIEF BY PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

On the day that the petition for writ of certiorari and brief in support thereof in the above-entitled case were filed in this Court, the Circuit Court of Appeals for the Third Circuit rendered its decision and opinion in the case of the *United States vs. Provident Trust Company of Pennsylvania, et al.* (referred to on page 26 of my former brief in support of the petition in this case.)

There is appended hereto a copy of the decision of the Circuit Court of Appeals for the Third Circuit in the said *Provident Trust Company* case. A com-

parison of the said decision with the decision of the United States Circuit Court for the Fourth Circuit in the case at bar (R. 34-40) shows that these two courts do not differ in their views of the characteristics of an estate by the entireties (which is the property sought to be excluded from taxation in both cases), but the said courts have arrived at diametrically opposite conclusions with respect to whether such property may lawfully be included in the gross estate of a decedent for federal estate tax purposes, and that is the only question at issue in each case. In the *Provident Trust Company* case the particular provisions under which the tax was imposed are Sections 401, 402 and 403 of the Revenue Act of 1921 and it is held that an estate by the entireties may not lawfully be taxed thereunder. In the case at bar the tax was imposed under Sections 201, 202 and 203 of the Revenue Act of 1916, and it is held that an estate by the entireties may lawfully be taxed thereunder. A comparison of the said sections in the two acts will show that the provisions which are relevant to the question presented in these two cases are identical in the two statutes except the differences in their numbers.

The petition for writ of certiorari in the case at bar therefore now presents a case in which a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. As shown in my former brief herein (p. 26), there have been other decisions by tribunals inferior to this court upon the same ques-

tion and all of them are contrary to the decision of the court below in the case at bar.

Respectfully submitted.

FRANK S. BRIGHT,
Counsel for Petitioners.

H. STANLEY HINRICHS,
BRIGHT, THOMPSON, HINRICHS & WARREN
Of Counsel.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 4009. March Term, 1929.

UNITED STATES OF AMERICA,
Appellant,

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA, AND CHARLES SINKLER, ADMINISTRATORS C. T. A. OF ESTATE OF JAMES K. YOUNG, DECEASED,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed October 4, 1929.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

WOOLLEY, *Circuit Judge.*

James K. Young and Mary Wilson Young, his wife, acquired as tenants by the entirety several parcels of real estate in Philadelphia. Later, they conveyed some of them for a consideration part paid and the balance secured by a ground rent, reserved to themselves as tenants by the entirety, to yield them a certain annual income, redeemable at a named figure.

James K. Young died in 1923. The Commissioner of Internal Revenue, upon review and audit of the

estate tax return made by his administrators, included in the decedent's gross estate the value of the ground rent and other property, so held, and determined a deficiency in the sum of $1,244.43. From this action Young's administrators appealed and the Board of Tax Appeals entered judgment against the Commissioner. 5 B. T. A. 1004. The United States then brought this suit in the District Court against Young's administrators to collect the additional tax so determined. The court, on facts averred in the statement of claim and admitted by the affidavit of defense, raising a question of law as though on demurrer, held that the Congress, by including for taxing purposes, in the gross estate of a decedent, property held by him and his wife as tenants by the entirety, exceeded its constitutional power and entered judgment for the defendants. The case is here on the government's appeal.

The tax was assessed under the Revenue Act of 1921. That Act, by Section 401, imposes a tax "upon the transfer of the net estate of every decedent dying after" its passage. Section 400 defines "net estate" to mean "the estate as determined under the provisions of Section 403." This section provides that the "net estate shall be determined by deducting from gross estate" certain items with which we are not concerned. To obtain a net estate there must, of course, first be a gross estate. So Section 402 provides that the gross estate of a decedent shall include the value at the time of his death of all property, real and personal, "to the extent of the interest therein held jointly, or as tenants in the entirety, by the decedent and any other person."

In a word, the Congress provided that the value of property held at the time of death by a decedent and his spouse as tenants by the entirety shall be

included in the deceased tenant's gross estate, and imposed a tax upon the transfer of the resultant net estate. The single question in this case is whether or not the Congress had power to draw such an estate within its reach and impose an estate tax upon it.

The effective words of the quoted provisions of the Revenue Act are "transfer" and "net estate." The Congress, in these provisions and in like provisions in other revenue acts, has been careful to impose the tax not upon property but upon the "transfer" of an interest in property, and the courts in construing the provisions have said, again and again, that the tax is not upon property but upon the privilege of transferring it. Thus the acts avoid imposing a direct tax, which to be valid must be apportioned. Section 2, Clause 3, and Section 9, Clause 4, of Article I of the Constitution. Hilton v. United States, 3 Dall. 174.

But the meaning of the word "transfer" as interpreted by the courts is not so literal as at first it would seem to be. Therefore, in order to determine whether the interest of a deceased tenant by the entirety constitutes an "interest" in his property which from its nature can be included in his gross estate, and whether on his death there is a transfer of such an interest to his co-tenant which is taxable as a part of his net estate, we shall look into the meaning of a "transfer" as the subject of taxation.

The earliest pronouncement upon the subject was made in Knowlton v. Moore, 178 U. S. 41, which was a full recognition that the transmission of some interest in property occasioned by death is the basis for the imposition of an estate tax as distinguished from a direct tax on property.

Reviewing the field of death duties and bringing the act then under review within its boundary, the Supreme Court stated that:

> "Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

Knowlton v. Moore has been cited in practically every case in which federal estate tax acts have been involved and we know of no instance in which the court's declaration of the principles upon which such acts are based has been departed from.

The tax has ever been treated as a duty or excise because of the particular occasion which gives rise to its levy. New York Trust Co. v. Eisner, 256 U. S. 345; Y. M. C. A. v. Davis, 264 U. S. 47. The subject of the tax—the event upon which the tax is predicated—is the transmission of some interest in property *occasioned by death,* hence the classification of estate taxes as death duties. If no interest is transmitted, or if no transfer takes place by the event of death, the subject of the tax is absent and accordingly no estate tax can be validly imposed. While steadfastly adhering to the principle that death is the generating source from which the taxing power takes its being, the Supreme Court has recognized transfers subject to the tax that had been made otherwise than by death yet made finally effective at death, such as transfers made before death yet in contemplation of death, transfers in trust made before death with power reserved by the settler to revoke them, Reinecke v. Trust Company, 278 U. S. 339; transfers of insurance policies with power reserved by the insured to change the beneficiaries,

Chase National Bank v. United States, 278 U. S. 327; and transfers of property with a reserved power of appointment, Saltonstall v. Saltonstall, 276 U. S. 260. In all these cases the transfers had not been completely effected or the privilege of succession or the right of possession or enjoyment fully exercised before death. But in all death terminated reserved powers of control and effected final transfers to the advantage of those who had obtained the properties subject to the powers. Thus there was brought about at death, or by death, a "shifting of the economic benefits and burdens of property which is the real subject of the tax." Saltonstall v. Saltonstall, *supra*.

A pertinent distinction is that the tax is not upon the interest to which another succeeds on death but is an excise upon the transfer of the estate of the owner upon his death, to be reckoned upon the value of the interest transferred. Y. M. C. A. v. Davis, 264 U. S. 47, 50; Edwards v. Slocomb, 264 U. S. 61. Nor is the tax limited to a transfer of property directly from the decedent to the transferee but extends at least to a transfer of property which, though not the decedent's was produced by him with the purpose, effected at his death, of having it pass to another.

Thus do the courts regard a "transfer"—the thing taxed—as it appears in the provision of the Revenue Act under review. Of course, if there is no transfer, there is no valid tax. But the Act imposes the tax upon something more than a transfer, namely: "upon the transfer of the *net estate*" of a decedent. So, also, if there is no net estate of the decedent, there is no valid tax. Thus we come to the question whether on the death of one tenant by the entirety there is any "interest" in his estate which, because of a transfer to the other tenant occasioned by his death, falls into his gross estate and later becomes taxable as a

part of his net estate. The answer to this question by a federal court depends primarily on the character of a tenancy by the entirety under the law as declared by the courts of the state in which it exists, for a construction or definition of the estate by the courts of the state constitutes a rule of property which is binding upon federal courts in considering its devolution or transfer. DeVaughn v. Hutchinson, 165 U. S. 566, 570; Clarke v. Clarke, 178 U. S. 186; Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 464.

A tenancy by the entirety in Pennsylvania retains in their purity all the characteristics of its English origin. A quotation from one of many decisions by its courts, always in harmony, will disclose the rule of property which Pennsylvania has laid down in respect to an estate of this character.

In Biehl v. Martin, 236 Pa. 519, 522, decided as recently as 1912, the Supreme Court said:

> "This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject.
>
> "Fundamentally the estate rests on the *legal unity of husband and wife;* it is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct *yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one while the rights of*

survivorship remain to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unity made up of divisible parts; that of a husband and wife is also a unity, but is made up of undivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either, the survivor takes a new estate. He acquires by survivorship the moiety of his deceased co-tenant. In the last case, although there are two natural persons, they are but one person in law, and *upon the death of either, the survivor takes no new estate.* It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individual identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.'" Stuckey v. Keefe, 26 Pa. 397.

Federal courts in the Third Circuit have from time to time recognized the authority of the aforegoing case. Getty v. A. Hupfel's Sons, 292 Fed. 178; 299 Fed. 939. (1923, 1924.)

The courts of Pennsylvania are entirely consistent in carrying into effect, even in matters of taxation, the rule of property thus declared. The transfer inheritance tax statute of Pennsylvania provides a succession tax. In a case where an attempt had been made to tax a tenancy by the entirety it was contended (as it is contended in the case at bar) that the transfer did not take effect in possession and enjoyment until after the death of one of the tenants

and that it was then that the possession and enjoyment passed to and became effective in the surviving spouse. The court held that, as the right of possession and enjoyment arose at once in favor of both grantees, the survivor received nothing by virtue of the death of her husband which might be the subject of the tax. Estate of Henry G. Fink, 6 Erie County Law Journal 281 (1922).

This federal court is thus confronted by a rule of property, in respect to "descent, alienation and *transfer*," definitely established by the law of the state in which the land is situated. DeVaughn v. Hutchinson, 165 U. S. 566, 570. If only we could ignore what some term the "technical characteristics" of a tenancy by the entirety (which Pennsylvania, however, has declared to be its basic characteristics), regard the legal unity of husband and wife as "pure fiction" and look upon the estate as a "practical matter," the problem would be easy to solve. But we must face the problem precisely as the Commonwealth of Pennsylvania and the Congress have presented it. That it is a problem the government recognizes by its concessions in its brief that "In the case at bar . . . neither the title nor the estate nor the interest of the survivor was created by the death of the decedent"; and that "Congress has undertaken, in spite of the well established rule that there is no transfer of title or of interest or of estate from one tenant by the entireties to another upon death," to impose a tax upon estates of this class. The government, however, meets this legal difficulty by stating (what is true) that in this case on the death of one tenant "there was a *change* in the incidents of the survivor's estate," and that Congress provided "that the change in the relation of the wife to the property *shall be considered* a transfer affording a proper subject matter to be taxed."

By these concessions the government rather begs the question, or very nearly admits the question out of the case, for the question concerns the *power* of the Congress to do what it did, namely, to tax as a transfer an interest in an estate of this kind on death when in an estate of this kind there is no transfer on death. If there be no transfer the Congress, "under the mere guise of reaching something within its powers, . . . may not lay a charge upon what is beyond them." Nichols v. Coolidge, 274 U. S. 531, 541.

The government, by basing its case upon a "change" in the relation of the two tenants, occasioned by the death of one, as the subject matter to be taxed, manifestly can succed only if that change amounts in law to a transfer. On the theory of taxable change, an argument may be made something like this:

On the instant of the husband's death in this case the estate by the entirety ended; then the wife acquired another estate—an unfettered fee—of which she became the sole owner. The instant he died, the wife had something she did not have before. True, in the theory of a tenancy by the entirety she had, as before, the whole estate, yet it is now shorn of the incident of her husband's right of survivorship. What came to her on her husband's death necessarily passed from him. Thus his death generated not merely a change of owner but a change of estate. He being first to die, that which left him was his right of survivorship and while, of course, his right of survivorship could not as such pass to his wife, it, nevertheless, passed out of legal existence and thus effected a change or transfer of an interest in property which once was wholly his and which now is wholly hers. But for the husband's death, his wife, though in fiction holding the whole estate, would con-

tinue to hold actually a limited interest in the estate, yet by reason of his death the estate by the entirety ceased, a change in the estate was wrought, and her interest in the estate by reason of his death and her survivorship became unqualified and absolute. Of course this line of reasoning overlooks the legal fact that the generating source of the wife's estate, even after her husband's death, was not his death but the instrument that created the estate, and it also overlooks the significant principle declared in Knowlton v. Moore that transmission by death (not transmission from the dead) is alone the generating source from which the taxing power, here exercised, takes its being. And thus we are back to where we were at the start. Was there a "transfer" of an interest occasioned by death? A mere change of status, though accompanied by economic benefits, does not necessarily involve a transfer of an interest in property even if the change be brought about by death. It can hardly be said that the change effected by death of the tenant of a particular estate involves a transfer of his estate to the remainderman when, in law, the two estates were created at the same time long before, the estate of the remainderman having vested at the time of its creation. Nor does the mere ceasing or ending of an estate, distinguished from the ceasing of an estate with reserved powers not exercised, constitute a transfer or provide a subject matter for taxation for when, as in the instance of a vested remainder, the particular tenant dies, all that he had ceases to be his and passes out of him, it is true, but it passes out of him by virtue of the instrument of its creation, and the economic benefits which usually and naturally enure to the remainderman (or other person succeeding) are occasioned not by his death but by that instrument. A change in

an estate or a cessation of an interest in an estate whereby nothing is left in or transferred through the estate cannot create something in the "net estate" of a decedent on which to base an estate tax.

Keeping in mind that each tenant by the entirety is completely seized of the whole estate by virtue of the creative instrument, and that when one dies the other takes nothing by a new title but merely ceases to divide its enjoyment, United States v. Robertson, 183 Fed. 7, 11, we inquire, what passed out of the husband in this case when he died? Certainly his right of survivorship. What came to the wife when he died? Not a moiety or other part of the estate because the prior holding had not been joint; and certainly not the whole of the estate for that she already had acquired and continued to hold under the instrument which created the estate. What was the result of the husband's death upon her? She got rid of him and his right of survivorship and of any obligation on her part to divide the enjoyment of the property with him. The interest of both being per tout et non per my, that is, where neither is a tenant of a moiety but each is a tenant of the whole, when the husband died his tenancy simply ended and the wife's simply continued precisely as it was arranged by the original instrument. When, as here, the husband died, the wife received nothing from him. She already had all there was to be had—the whole estate. Therefore on his death nothing was transferred from him to her. He stopped and she went on, and still goes on, just as she began without waiting upon, or being dependent upon, any transfer of his interest in the property theretofore held by them as tenants by the entirety—unless, indeed, the "change" which followed the husband's death resulted in a shifting of the economic benefits

and burdens of property, including thereafter her sole right to alien, encumber and devise, and unless this shifting of benefits and burdens amounted in itself to a "transfer" to her of an "interest" which *belonged* to her husband and which on his death fell into his gross estate and thereafter became a part of his net estate subject to tax within the latitude which the decisions have given to that expression. Uuless we ignore the peculiar yet essential characteristics of a tenancy by the entirety which grew up in the common law and persisted without change through the law of Pennsylvania, we cannot find that on the death of one tenant the interest which he had in the estate when living is, by reason of his death, transferred to the tenant surviving, nor, remembering that each tenant is seized of the whole, can we find that on the death of one the value of the whole property shall be taken as the measure of the interest claimed to be transferred, as though he were the sole owner, or that the tenant surviving, also holding the whole title, should have the value of her estate taken as the basis and measure of the decedent's tax.

We are constrained to hold with the learned trial judge that it was beyond the constitutional power of the Congress, exercised by Section 402 (d) of the Revenue Act of 1921, to include in the decedent's gross estate property held by him and his wife as tenants by the entirety. Holding therefore that the tax assessed by the Commissioner under Section 401 of the Act is void, the judgment of the District Court is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

PETITIONERS' BRIEF

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The Print Craft Shop, Washington, D. C.

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OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported at 33 Fed. (2d) 724 and is also printed at R. p. 30. The opinion of the District Court for the District of Maryland is reported at 28 Fed. (2d) 887, and is also printed at R. p. 7.

JURISDICTION.

Judgment against the present petitioners was originally entered by the Circuit Court of Appeals on the

6th day of July, 1929. (R. 36). Petition for writ of certiorari was filed October 4, 1929, which was within three months (Sec. 8 of the Act of February 13, 1925, 43 Stat., 936) after the order of July 6, 1929. The petition for writ of certiorari was granted by this Court on October 14, 1929. (R. 37.)

STATEMENT OF THE CASE.

The facts are not in dispute and the case was submitted to the District Court upon an agreed statement of the facts. (R. 23.) So far as material to the issues involved, the facts are as follows:

James E. Tyler, a resident of the State of Maryland, died in said state on May 7, 1918, intestate, and petitioners were duly appointed administrators of his estate and are still acting as such. At his death the decedent and his wife were the owners of three hundred and fifty (350) shares of the common stock of the Kimball-Tyler Company, a West Virginia corporation doing business in Maryland, the stock standing on the books of the corporation in the names of "James E. Tyler and Ida H. Tyler, as tenants by the entireties", having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock, which at his death was valued at $59,193.42, and said sum was included by the Commissioner of Internal Revenue as a part of his gross estate in computing the estate tax liability under the revenue Act of 1916, thereby increasing said tax in the amount of $3,337.67. A claim for refund was seasonably filed and, upon its rejection, the administrators of the estate entered suit for recovery of this amount of the tax in the United States District Court for the District of Maryland (R. 1).

The United States filed two pleas in the District Court (R. 6) and upon issues joined (R. 6), trial was before the Court without a jury and verdict and judgment for the amount claimed were rendered for the taxpayer (R. 21–2). The Court rendered an opinion in the case in which it was held that Section 202 (c) of the Revenue Act of 1916 includes estates by the entireties, but since the effect of said Section 202 (c) of the act is to levy a direct tax upon decedent's estate contrary to Article 1, Secs. 2 and 9 of the Constitution, said section 202 (c) of the Revenue Act of 1916 is invalid in so far as it affects a tenancy by the entireties; and that the tax in this case in so far as it includes tenancies by the entireties, measures the tax upon decedent's estate by property which belongs to another, namely the surviving spouse, and for this reason is arbitrary and capricious and in violation of the due process clause of the Fifth Amendment to the Constitution (R. 7–21). The Circuit Court of Appeals reversed the judgment (R. 37) and rendered an opinion in which it was held that Congress intended to tax tenancies by the entireties and such a tax was not in violation of the Constitution or the Fifth Amendment thereof (R. 30–36).

There may be a tenancy by the entireties in personal property as well as real property in the State of Maryland.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that imposition of an estate tax upon the estate of a decedent which included the value of the interest held jointly by himself and spouse (who survived him) as tenants by the entireties did not amount to the imposition of a direct tax in violation of Article

1, Section 2, and Article 1, Section 9, of the Constitution of the United States.

2. The Circuit Court of Appeals erred in finding and holding that said tax did not amount to confiscation of property in violation of the due process clause of the Fifth Amendment of the Constitution inasmuch as the said tax is measured by the value of the interest of the surviving tenant as well as that of the deceased tenant by the entireties.

3. The Circuit Court of Appeals erred in finding and holding that Section 202 (c) of the Revenue Act of 1916 in so far as it includes tenancies by the entireties is valid.

4. The Circuit Court of Appeals erred in rendering a judgment in favor of the respondent in this Court and against the petitioner.

5. The Circuit Court of Appeals erred in refusing to enter a judgment in favor of the petitioner in this Court and against the respondent.

6. The findings and judgment of the Circuit Court of Appeals in this case are based on a wholly erroneous conception of the law and said Court misapplied and misinterpreted the applicable decisions of this Court.

ARGUMENT.

The Statutes involved are as follows:

Title II of the Revenue Act of 1916 (39 Stats., 756) provides, so far as pertinent to this case:

> "Section 201. That a tax (hereinafter in this Title referred to as the Tax), equal to the following percentages of the value of the net estate, to be determined as provided in Section 203, is hereby imposed upon the transfer of the net

estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: * * *

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivior, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. * * *

"Sec. 203. That for the purpose of the tax value of the net estate shall be determined—

"(a) In the case of a resident by deducting from the value of the gross estate.

"(1) Such amounts for funeral expenses, * * * and

"(2) An exemption of $50,000."

The above provisions, with minor changes which are not material, are continued in the Revenue Acts of 1918, and 1921, at Section 401, 402 and 403 and in the Revenue Act of 1924 as Sections 301, 302 and 303.

Because of the fact that a tenancy by the entirety or by the entireties is a peculiar estate and exists only in the case of husband and wife and it is inaccurately described in the law, it has been questioned whether Congress intended to include tenancies by the entireties in the above provisions of the 1916 Act. See Blount vs. United States, 59 Ct. Cl., 328. In the Revenue Acts of 1924 and 1926 the language of

the provision was changed so as to read—"or as tenants by the entirety by the decedent and spouse."

The Commissioners of Internal Revenue has always claimed that the original provision contemplated the taxing of estates by the entireties and both the District Court and Circuit Court of Appeals for the Fourth Circuit in this case concurred in said holding. In this brief it will be assumed that such was the intention of Congress.

SUMMARY OF ARGUMENT.

Point A. Effect of decisions subsequent to decision of Circuit Court below.

Point B. Character of estates by the entireties.

Point C. Under the common law there is no transfer of title or interest in property upon the death of a tenant by the entireties.

Point D. It is a settled rule of property in Maryland that there is no transfer of any title or interest in property upon the death of a tenant by the entireties.

Point E. Inasmuch as the nature and incidents of an estate by the entireties constitute a rule of law of Maryland, such rule is binding upon the Federal Courts in determining the effect of the succession to the interest of a deceased tenant by the entireties in Maryland.

Point F. In so far as Section 202 (c) of the Revenue Act of 1916 attempts to tax the interest of a tenant by the entireties it is a direct tax upon the property itself, and in violation of Art. I, Sections 2 and 9 of the Constitution.

Point G. The tax is an arbitrary tax and in violation of the Fifth Amendment of the Constitution.

Point H. The decision in this case is inconsistent with the decision of this Court in the case of Chase National Bank v. United States, 278 U. S., 327,

and is irreconcilable with the decision of this Court in the case of Reinecke v. Northern Trust Co., 278 U. S., 339.

POINT A.

Effect of Decision Subsequent to Decision of Circuit Court Below.

Subsequent to the decision of the Circuit Court of Appeals in this case, the Circuit Court of Appeals for the Third Circuit in United States v. Provident Trust Company of Pennsylvania, et al., 35 Fed. (2d) 339, held exactly contrary to the decision of the Fourth Circuit. At the same time the same Court in the case of Commissioner of Internal Revenue v. Girard Trust Company, et al., Executors of the Estate of Woolston, 35 Fed. (2d) 343, affirmed the decision of the Board of Tax Appeals in that case on the authority of the case of United States v. Provident Trust Company, supra.

At the very outset we feel that this Court may well note the circumstances under which this issue comes before it. Ordinarily a petitioner or appellant must bear the burden of the argument in overcoming whatever presumption of correctness attaches to the decision appealed from and the burden of convincing the Appellate Court that it should take the affirmative step of reversing the decision below. Here, however, there are on the docket the two other cases above cited in which the Court has granted the government's petitions for writs of certiorari and in which as stated the decisions below on this same question are in the taxpayer's favor. These two cases are set for argument immediately following the argument in this case.

It appears, therefore, that the Court must either reverse the decision of the Circuit Court of Appeals

in the present case or reverse the decisions in the two cases decided by the Third Circuit Court of Appeals and there can be no presumption that the decision below in the present case is any more correct than the contrary decisions in the Provident Trust Company and Girard Trust Company cases. As a matter of fact if there is to be any presumption it should be the other way as the two cases from the Third Circuit were decided by that Court after the Fourth Circuit had rendered its opinion.

POINT B.

Character of Estates by the Entireties.

Perhaps special weight should be given to the decision of the Third Circuit in the Provident Trust Company case because the opinion in that case is by Circuit Judge Woolley, a lawyer brought up in the State of Delaware and steeped in knowledge of estates by the entireties which exist in Delaware in all their common law virility.

It should also be set out here, it is respectfully submitted, that in spite of the fact that in some jurisdictions estates by the entireties have either been repealed or modified by statute, the estate itself has many beneficent features. Of all the estates of the common law, it is the only one which is a complete protection of the family. The improvident man who is the co-tenant of an estate by the entireties with his wife cannot dispose of it or encumber it either voluntarily or involuntarily, for no judgment rendered against him during his lifetime can be collected from this estate after his death if the wife survives, nor is the estate liable in any way after his death to any debt that he may have created during his lifetime. Those who have lost familiarity with the estate in

its purity because of residence and practice in jurisdictions where it no longer exists might well think that the estate was one used solely to avoid the payment of taxes but it is a matter of common knowledge to everyone who lives in a state where the estate by the entireties still exists that it is not only a beneficent estate but that it is one very widely used for many reasons. In addition to those above cited, one that occurs to every lawyer familiar with it is that as to an estate by the entireties since the interest of the decedent ceases at his death and there is no transfer from him to anyone but his whole estate comes to an end, no administration is necessary or could be had, if there is no other estate, as only frequently happens.

Judge Woolley in his opinion quotes a decision of the Supreme Court of Pennsylvania in Biehl v. Martin, 236 Pa. 519, which he states discloses the rule of property which Pennsylvania has laid down with respect to an estate of this character and the same rule prevails in Maryland and decisions of the Maryland courts are to the same effect. For the convenience of the Court that description of this estate is attached to this brief as Appendix I.

POINT C.

Under the Common Law There Is No Transfer of Title or Interest in Property Upon the Death of a Tenant by the Entireties.

The decision of the Circuit Court of Appeals in this case is based upon the theory that because the tenants by the entireties were two separate individuals, there was in fact and in law a transfer upon the death of one of the tenants to the survivor because:

> "Whatever form of technical expression be used the fact remains that, upon the death of one of

the parties the survivor by operation of law succeeds to the interest which the decedent had in the property." (Record 38.)

On the contrary, it is an established principle of the common law, which has been recognized by this Court, that in fact and in law there is no **transfer** of title or of interest upon the death of a tenant by the entireties to the surviving tenant.

> "The survivor takes by virtue of the original grant or devise; he does not take a new or additional interest by virtue of survivorship, nor does he take by descent or intestate distribution."
> 30 C. J., 571;
> Hunt vs. Blackburn, 128 U. S., 464, 469;
> U. S. vs. Robinson, 183 Fed. Rept., 711;
> Hupfel's Sons vs. Getty, 299 Fed. Rep., 939;
> Biehl vs. Martin, 236 Pa., 519;
> Palmer vs. Mansfield (Mass.), 110 N. E., 283;
> Matter of Klatzl, 216 N. Y., 83.

There are no decisions of this Court to the contrary effect and as shown elsewhere in this brief (Point D), the test of the power of Congress is whether there was at death a transmission or transfer from the dead to the living of an interest in property; because it is that—the privilege or right of transfer which the State may change at any time and, therefore, may tax. Where there is no privilege there is no transfer and where there is no transfer there can be no tax. As stated by this Court in the opinion in the case of Nichols vs. Coolidge, 274 U. S., 531, 541.

> "Congress may lay an excise upon the **transfer** of property reckoned upon the value of the interest **which passes thereby.** But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results." (Emphasis ours.)

POINT D.

It is a Settled Rule of Property in the State of Maryland That There Is No Transfer of Any Interest in Property by the Death of a Tenant by the Entireties.

In the case of Marbury vs. Cole, 49 Md. 402, 411, it was held that:

> "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants nor are they tenants in common. They are in the contemplation of the common law but one person, and hence they take not by moieties but by the entireties. They are each seized of the entirety and the survivor takes the whole. As stated by Blackstone, husband and wife being considered as one person in law, they cannot take the estate by moieties but both are seized of the entireties, per tout, et non per my; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other but the whole must remain in the survivor. 2 Blac. Comm. 182. This has been the doctrine of the common law from an early period of its history for we find the principle as stated by Blackstone laid down in Littleton's Tenures, Section 291, from whence it has been almost literally transcribed by all subsequent writers on estates. See Co. Litt. 187; 2 Cruise Dig., 492; 1 Prest. Est., 131–2; 4 Kent's Comm., 362; 1 Wshb. R. Prop. (4th Ed.), 672, and the authorities there cited."

See also, Brewer vs. Bowersox, 98 Md., 567;
McCubbin vs. Stanford, 85 Md., 378;
Baker vs. Baker, 123 Md., 32;
Ades vs. Caplin, 132 Md., 66.

In Maryland there may be a tenancy by the entireties in personal property as well as real property. Brewer vs. Bowersox, supra; Baker vs. Baker, supra.

Under the decisions of the Courts of Maryland neither tenant can mortgage or convey any interest in an estate by the entireties without the consent of the other tenant. McCubbin vs. Stanford, supra.

The property would not pass to a tenant's trustee in bankruptcy.

Frey vs. McGaw, 127 Md., 23;
Ades vs. Caplin, supra.

In the case of Ades vs. Caplin, supra, the Court (at page 69) stated:

> "The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife, without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice, such estate to any greater extent than if it vested in the wife exclusively in her own right. He has no such estate as he can dispose to the prejudice of the wife's estate. The unity of the husband and wife as one person, and ownership of the estate by that person, prevents the disposition of it otherwise than jointly."

A Judgment against one tenant does not affect the property.

Jordan vs. Reynolds, 105 Md., 288.

POINT E.

Inasmuch as the Nature and Incidents of an Estate by the Entireties Constitute a Rule of Property Under the Law of Maryland, Such Rule Is Binding Upon the Federal Courts in Determining the Effect of the Succession to the Interest of a Deceased Tenant by the Entireties in Maryland.

Congress cannot declare that there is a transfer from a deceased tenant to the surviving tenant by the entireties in Maryland where the State law says there is none, without modifying the State law to that effect.

its purity because of residence and practice in jurisdictions where it no longer exists might well think that the estate was one used solely to avoid the payment of taxes but it is a matter of common knowledge to everyone who lives in a state where the estate by the entireties still exists that it is not only a beneficent estate but that it is one very widely used for many reasons. In addition to those above cited, one that occurs to every lawyer familiar with it is that as to an estate by the entireties since the interest of the decedent ceases at his death and there is no transfer from him to anyone but his whole estate comes to an end, no administration is necessary or could be had, if there is no other estate, as only frequently happens.

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> Matter of Klatzl, 216 N. Y., 83.

There are no decisions of this Court to the contrary effect and as shown elsewhere in this brief (Point D), the test of the power of Congress is whether there was at death a transmission or transfer from the dead to the living of an interest in property; because it is that—the privilege or right of transfer which the State may change at any time and, therefore, may tax. Where there is no privilege there is no transfer and where there is no transfer there can be no tax. As stated by this Court in the opinion in the case of Nichols vs. Coolidge, 274 U. S., 531, 541.

> "Congress may lay an excise upon the **transfer** of property reckoned upon the value of the interest **which passes thereby.** But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results." (Emphasis ours.)

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It is a Settled Rule of Property in the State of Maryland That There Is No Transfer of Any Interest in Property by the Death of a Tenant by the Entireties.

In the case of Marbury vs. Cole, 49 Md. 402, 411, it was held that:

> "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants nor are they tenants in common. They are in the contemplation of the common law but one person, and hence they take not by moieties but by the entireties. They are each seized of the entirety and the survivor takes the whole. As stated by Blackstone, husband and wife being considered as one person in law, they cannot take the estate by moieties but both are seized of the entireties, per tout, et non per my; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other but the whole must remain in the survivor. 2 Blac. Comm. 182. This has been the doctrine of the common law from an early period of its history for we find the principle as stated by Blackstone laid down in Littleton's Tenures, Section 291, from whence it has been almost literally transcribed by all subsequent writers on estates. See Co. Litt. 187; 2 Cruise Dig., 492; 1 Prest. Est., 131–2; 4 Kent's Comm., 362; 1 Wshb. R. Prop. (4th Ed.), 672, and the authorities there cited."

See also, Brewer vs. Bowersox, 98 Md., 567;
McCubbin vs. Stanford, 85 Md., 378;
Baker vs. Baker, 123 Md., 32;
Ades vs. Caplin, 132 Md., 66.

In Maryland there may be a tenancy by the entireties in personal property as well as real property. Brewer vs. Bowersox, supra; Baker vs. Baker, supra.

Under the decisions of the Courts of Maryland neither tenant can mortgage or convey any interest in an estate by the entireties without the consent of the other tenant. McCubbin vs. Stanford, supra.

The property would not pass to a tenant's trustee in bankruptcy.

Frey vs. McGaw, 127 Md., 23;
Ades vs. Caplin, supra.

In the case of Ades vs. Caplin, supra, the Court (at page 69) stated:

> "The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife, without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice, such estate to any greater extent than if it vested in the wife exclusively in her own right. He has no such estate as he can dispose to the prejudice of the wife's estate. The unity of the husband and wife as one person, and ownership of the estate by that person, prevents the disposition of it otherwise than jointly."

A Judgment against one tenant does not affect the property.

Jordan vs. Reynolds, 105 Md., 288.

POINT E.

Inasmuch as the Nature and Incidents of an Estate by the Entireties Constitute a Rule of Property Under the Law of Maryland, Such Rule Is Binding Upon the Federal Courts in Determining the Effect of the Succession to the Interest of a Deceased Tenant by the Entireties in Maryland.

Congress cannot declare that there is a transfer from a deceased tenant to the surviving tenant by the entireties in Maryland where the State law says there is none, without modifying the State law to that effect.

Congress cannot create a transfer merely for the purpose of imposing a tax thereon where under the law governing the transaction, there is no transfer.

In the case of Edward Hines, Yellow Pine Trustee, vs. Martin, et al., 268 U. S. 458, at page 464, Mr. Justice Stone, speaking for this Court, stated:

> "To avoid the uncertainty and injustice which result from the 'discordant elements of a substantial right which is protected in one set of Courts and denied in the Court with no superior to decide which is right' (Brine vs. Insurance Co., 96 U. S. 627) this Court has not hesitated when there has been a conflict of decisions between it and the State Court affecting a rule of property within the State, to overrule its own decisions and to follow the State decisions, once it has become evident that they have established a 'rule of property' as a settled law of the State."

See also, Clarke vs. Clarke, 178 U. S., 186;
Warburton vs. White, 176 U. S., 484;
U. S. vs. Title Insurance & Trust Co., 265 U. S., 486.

POINT F.

In so far as Section 202 (c) of the Revenue Act of 1916 Attempts to Tax the Interest of a Tenant by the Entireties It Is a Direct Tax Upon the Property Itself, and in Violation of Art. I, Sections 2 and 9, of the Constitution.

One of the absolute rights inherent in every citizen is that of property, it consists in the free use, enjoyment and disposal of all of his acquisitions without any control or diminution save only by the laws of the land.

1 Blackstone Commentaries, 138;
Buchanan vs. Worley, 245 U. S. 60, 74.

A tax upon any essential element of ownership is a tax upon the ownership of property and therefore

a tax upon the property itself because property is in reality nothing more or less than those elements which the law has always recognized as attaching to the owner of a thing.

Thus, in Brown vs. Maryland, 12 Wheat., 419, it was held that a tax on the sale of an article imported only for sale is a tax on the article itself.

> See also, Welton vs. Missouri, 91 U. S., 275;
> Cooke vs. Pennsylvania, 97 U. S., 566;
> Nicol vs. Ames, 173 U. S., 509.

In Pollock vs. Farmers Loan & Trust Company, 157 U. S., 429, it was held that a tax upon income derived from rents or profits or income of real or personal property was a tax upon the property itself.

Taxes upon property are direct taxes and under the Constitution must be uniform and be apportioned among the several States according to their respective numbers.

A tax upon the transfer or transmission of property upon the death of a person has been held to be a tax upon such privilege or right of **transfer,** and such a tax is held to be an indirect tax within the meaning of the Constitution of the United States.

> Plummer vs. Coler, 178 U. S., 115;
> Murdock vs. Ward, 178 U. S., 139;
> Knowlton vs. Moore, 178 U. S., 41.

In the case of Knowlton vs. Moore, supra, in which the late Chief Justice White delivered the opinion of the Court, it was shown that in this and other countries, so-called death duties, estate taxes, legacy taxes and inheritance taxes, all "rest in their essence upon the principle that death is the generating force from which the particular taxing power takes its being, and that it is the power to transmit, or the

transmission from the dead to the living on which such taxes are more immediately rested."

The subject of direct taxes has most recently been before this Court in Bromley vs. McCaughn, 280 U. S., 124. In that case the Court held that a tax imposed upon a transfer **inter vivos** was not a direct tax, but the entire decision rests upon the conclusion that Congress, under the Constitution, had the power to tax a **transfer.**

If, as is herein shown, the decedent had nothing but an estate which terminated at his death, and it was not transferred because of his death, since he had nothing which could be transferred during his life, then clearly the element is here lacking that the Court found present in a gift **inter vivos** and the imposition of a tax upon an estate by the entireties is clearly a tax upon property, and not being apportioned among the several states according to their respective numbers, it is unconstitutional.

With the above principles of law in mind it is perfectly clear that in so far as Sections 201–203 of the Revenue Act of 1916, attempt to tax the estate of a decedent upon the value of any property which he held as a tenant by the entireties it is a direct tax, and in violation of the Constitution of the United States because as shown elsewhere in this brief (Points C. and D.), the decedent **never** had more than a life interest in the property unless he survived his cotenant. His interest was one to which the privilege or right of disposition at his death never attached. It was only the right or privilege of transmitting the interest of the decedent's property upon his death which Congress had the power to tax, and inasmuch as he lacked any such privilege or right with respect to his interest in an estate by the entire-

ties, there is nothing to which the tax can attach. The rights of a tenant by the entireties are only such as would obtain if the State had never granted any right or privilege of transmitting the property upon the death of a person.

POINT G.

The Tax Is an Arbitrary Tax and in Violation of the Fifth Amendment of the Constitution.

Section 202 (c) of the Revenue Act of 1916 levies a tax upon the estate of one tenant by the entireties measured by the value of the entire property held by both tenants by the entireties "except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

It will be noted that the provision taxes as a transfer upon the death of a tenant by the entireties and as a part of his estate, not his interest which terminated at his death and which of course was not transferred, but the tax is levied upon the entire property. In other words, the statute levies the same tax that would have been levied if he had been the sole owner of the entire property during his life with the right to dispose of same at his death. It taxes the adverse interests in the property of the cotenant. Yet the fact is that from the creation of the estate, the surviving tenant became entitled to the same interest in the property as the decedent during his lifetime and also to the right of survivorship upon his death. Surely it is inescapable that by this statute the estate of the deceased tenant is taxed upon the property of the surviving tenant and it is, therefore, an arbitrary tax. The tax is so arbitrary and capricious as to amount to confiscation and is in violation of the Fifth Amendment of the Constitution. See Brushaker

vs. U. P. R. Co., 240 U. S., 1, 24; Barclay & Co. vs. Edwards, 267 U. S., 442, 450. In the case of a decedent owning no property whatever at the time of his death except his interest in an estate by the entireties, if his estate is taxable upon the value of that property no tax could be collected without recourse to the property belonging exclusively to the surviving tenant.

POINT H.

The Decision in This Case Is Inconsistent with the Decision of This Court in the Case of Chase National Bank vs. United States, 278 U. S., 327, and is Irreconcilable with the Decision of This Court in the Case of Reinecke vs. Northern Trust Company, 278 U. S., 339.

The holding of the Court below to the effect that there was a transfer upon the death of the decedent of all his interest in an estate by the entireties to the surviving tenant, by operation of law, is apparently bottomed upon the Court's interpretation of the decision of this Court in the case of Chase National Bank vs. United States, whereas a proper understanding of the decision of this Court in the Chase National Bank case lends no support whatever to the decision of the Court below in this case.

In the Chase National Bank case the decedent had the power to change at any time prior to his death the name of the beneficiary under certain insurance policies upon his life, and this Court held that the interest in the policies retained by the decedent was so great that the transfer to the beneficiaries was not completed until the death of the decedent when the power of control was terminated, and that the power until death of control or to direct the further enjoyment or possession of property after death may

be considered tantamount to its exercise and therefore constitutes a taxable transfer. The devolution of the property after the death of the tenant was in accordance with his will because he coul have made a different disposition of it at his death. In that sense the decedent transmitted the property upon his death.

The element of power to control the disposition of the property after death, which was the privilege or right held to be taxable in the Chase National Bank case, is entirely lacking in the case of the death of a tenant by the entireties. In the latter case there is no power to change or revoke the right of survivorship, which existed in the cotenant from the very inception of the estate. In the case of a tenancy by the entireties the deceased tenant did not during his lifetime have any power to sell, mortgage, or dispose of any part of the property. He could not in any way prejudice the interest of his cotenant and he was without any power whatever to change in any way the right of survivorship which existed in the cotenant. Is it to be believed that if the decedent in the Chase National Bank case had been so circumstanced with reference to the insurance policies which were the subject of that suit that the Court would have held that there was a taxable transfer to his estate?

See Lewellyn vs. Frick, 298 Fed. Rep., 803.

The construction adopted by the Court below in this case of the language of this Court in the Chase National Bank case is utterly irreconcilable with the decision of this Court rendered on the same day in the case of Reinecke vs. Northern Trust Company, 278 U. S., 339. In that case the decedent during his lifetime had created seven separate trusts. In two of the trusts he reserved the income to himself for his life and after his death the income was to be

paid to certain other beneficiaries until the termination of the trust when the estate went to remaindermen. In each of these two trusts the decedent had reserved the power to revoke, alter, change or modify the trusts, but said power could not be exercised without the consent of the single beneficiary in four of the other trusts and the consent of the majority of the beneficiaries in the fifth trust. The decedent died without exercising any of the powers reserved under any of the trusts, and the question before the Court was whether or not transfers had taken place which were the subject of the federal estate tax law. This Court held that in the case of the two trusts in which the decedent had reserved the exclusive power of revocation a transfer had been effected at the time of his death, because until that time the gift had not been complete and the decedent had the right and privilege until death by revocation to change the disposition of the trusts upon his death. In the case of the five remaining trusts, however, in which the decedent did not have the exclusive power of revocation it was heid that no transfer took place at the time of his death and the Court, speaking by Mr. Justice Stone, gave the following as the reason:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial and consequently adverse interest, the trust for all practicable purposes had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." (p. 125.)

It was the lack of exclusive control by the decedent of the disposition of the property after his death which moved this Court to hold that there was no transfer upon which the tax could be predicated in the case of the five trusts in the Reinecke case. It is manifest that if there had not been such exclusive

control of the future disposition of the property covered by the insurance policies in the Chase National Bank case, decided on the same day, the Court would have held in the Chase National Bank case that there was no taxable transfer. Neither case therefore supports the decision of the Court below in this case, because in both cases before this Court the taxable interest was the exclusive power until his death in the decedent to direct the devolution of title, whereas in the case of a tenancy by the entireties neither tenant has at any time the power to revoke or defeat the other tenant's interest in the property, and the death of one tenant does not give to the surviving tenant anything more than what that tenant had under the original grant. Death simply destroys the interest of the deceased tenant. In this case deceased tenant's interest was not transferred at his death, but merely ceased at his death and that is all that he ever had unless he survived his cotenant. Therefore there was no interest transferred at his death which can be properly included in the value of his estate.

CONCLUSION.

It is therefore respectfully submitted that in so far as the Revenue Act of 1916, Section 202 (c), intends to include for Federal Estate Tax purposes in the gross estate of the decedent property held by decedent and his wife by the entireties, it is beyond the constitutional power of Congress and, therefore, the decision of the Circuit Court of Appeals below should be reversed.

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APPENDIX I.

"In Biehl v. Martin, 236 Pa. 519, 522, 84 A. 953, 954, 42 L. R. A. (N. S.) 555, decided as recently as 1912, the Supreme Court said:

"This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to those peculiar incidents which naturally and logically attach especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject.

"Fundamentally the estate rests on the **legal unity of husband and wife.** It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to **legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate.** 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit, made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case although there are two natural persons, they are but one person in law, and **upon the death of either the survivor takes no new estate.** It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor, the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.' Stuckey v. Keefe, 26 Pa. 397."

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IN THE

Supreme Court of the United States

October Term, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

ANALYSIS OF AND REPLY TO THE RESPONDENT'S BRIEF

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1. It has been heretofore agreed by Petitioners that the inclusion of an estate by the entirety in the gross estate of a decedent is the intention of Congress in the controlling provisions of the 1916 and 1917 Acts.

2. If Congress had the power under the Constitution to do this, that power must be based on its right to impose an excise tax on a transfer. Petitioners, of course, agree that Congress has such a right and by these Acts no apportionment of the tax was attempted, as would be necessary if the tax is anything other than an excise tax.

3. Respondent on page 5 of its brief admits that "neither the title nor the estate of the survivor was created by the death of the decedent." Doubtless respondent will go further and admit, as all the authorities hold, that the title and estate of the survivor were created on the day the estate by the entirety first came into existence.

4. Respondent contends that "there was nevertheless a shifting of economic benefits upon decedent's death occasioned by his death," and petitioners contend that this shifting, upon which alone respondent seeks to justify the tax, was not by virtue of a transfer at decedent's death, but when the estate was created.

5. Of necessity there is a "relinquishment of possession, enjoyment or control" of all that he possessed by decedent on his death, as contended by respondent, for the dead have no title even to their graves, but petitioners contend that a mere "relinquishment" without a transfer is not taxable.

6. The practical result, however, of the dissolution of an estate by the entirety by the death of one spouse is not as claimed by respondent to **transfer** to the surviving spouse an unfettered ownership in fee, even though it is true that after death the surviving spouse has such a fee and that prior to the death of the decedent she did not have it.

7. If, however, this unrestricted fee was not transferred **from** the decedent spouse, and did not belong to him at the time of his death, respondent cannot maintain that it is taxable by the Acts, for by those Acts, only a tax on a transfer is constitutional. The law does not attempt to tax anything which has neither **shifted** to the survivor from nor been trans-

ferred by the decedent by virtue of death, testamentary disposition, or transfer in contemplation of death.

8. It would seem to be axiomatic that one neither living nor dead can transfer that which he has not had control, possession or enjoyment of, and unless decedent had during his life the unfettered fee which his wife did not have before his death, and did have after his death, then that unfettered fee certainly did not shift from him to her, nor was it transferred by him to her, and if petitioners understand respondents' contention it is based on the mere fact that after decedent's death the surviving spouse had this unfettered fee.

9. The authorities on this "several hundred year old estate" are uniform as to what incidents of ownership each spouse has during the continuance of the estate by the entirety. Not one of those authorities gives to either spouse an unfettered fee, but all that is given to either is a right in case of survivorship. On the death of decedent Tyler, his rights incident to survivorship, in the language of Mr. Justice McReynolds in May vs. Heiner, decided April 15, 1929, were "obliterated," and thereafter the surviving spouse had the unfettered fee; but as stated, it was not shifted from the husband or transferred by him at death.

10. Since the decision of the court in Bromley v. McCaughn, 280 U. S., 124, no one can question the constitutionality of a tax upon a gift inter vivos, and petitioners admit that if at the creation of the estate by the entireties there had been on the statute books a gift tax law, Mr. Tyler would have been liable to such a tax, but there was no gift tax enacted until 1924 and the court is concerned here with a death duty and not a gift tax. If the creation of the estate would have subjected the transfer to a gift tax, the trans-

action by virtue of which Mrs. Tyler enjoys the property must necessarily have occurred when the estate was created and could not have occurred at his death.

11. If decedent **had** retained an interest in the estate by the entirety which **had** passed to his wife on his death, his estate would have been liable for a tax on that transfer, but as shown above, what the wife had after decedent's death had never been decedent's from the hour of the creation of the estate by the entirety, and of course it could not have passed from him to her at death because he did not then possess the unfettered fee or anything else which passed to his wife.

12. It is not believed that respondent would maintain that decedent's tax could be measured by the separate property of his wife and that her property could be taken to pay decedent's debt. The unfettered fee of the wife after the death of the decedent was just as much her separate property as if it had come to her by gift from her father, never having belonged to decedent any more than his wife's separate estate belonged to him, and to use it as a measure of decedent's tax, and to take part of this unfettered fee to pay decedent's tax would be arbitrary and capricious. To collect the husband's tax out of a wife's separate estate or out of her property received as surviving tenant by the entireties, as has heretofore been shown, might become necessary in certain instances, would be just as much a taking of property without due process of law as it would be to take John Smith's property to pay decedent's tax.

13. Petitioners agree, as held by the court in Chase National Bank against the United States and urged by respondent, that "the transfer of any property procured through expenditures by decedent with the purpose effected at his death of having it pass to

another" is taxable, but we understand that language to refer to a very different state of facts than we have here. In that case decedent owned during his life certain policies of insurance always subject to his changing the beneficiary and therefore up to the minute of his death subject to his control. This was taxable property, but the decedent Tyler at his death did not own or control this property so as to be able to dispose of it in any way.

14. In Reinecke v. Northern Trust Company, 278 U. S., this court refused to tax the five trusts that had passed out of decedent's control at the date of their creation, but rightfully taxed the two which he alone had the right to control up to his death. On his death, this control of these two, being a most important element of property belonging to him, passed to others without his consent, so that the control at that minute passed from him and was rightly taxed. That is entirely different from the acquisition of the unfettered fee of the wife through which it is here sought to sustain the tax because, as above shown, this unfettered fee never was the property of decedent after the creation of the estate and it could not, therefore, pass to her on his death. Since it was not transferred in any sense, it was not taxable.

15. Respondent seeks to draw an analogy between an estate by the entireties and a power of appointment, but under a power of appointment up to the moment of his death decedent has a valuable right of property which if he exercises by will is of course taxable, but which if he does not exercise nevertheless carries the property, up to his death in his control, and then it passes freed from his control to others. The deceased spouse of an estate by the entireties, as above pointed out, never had anything which passed

to anybody at his death, and whatever the wife had after death was not shifted from the husband because he never had it and it was not transferred by him. As to the husband, it is true his interest in the estate was obliterated, but the law does not seek to tax as part of a man's estate what was not his. It does not seek to reach anything except something that partakes of the characteristics of a testamentary disposition. Just because the wife has something after death that she did not have before death, that can no more be taxed as part of her husband's estate unless it came from him by virtue of his death than, as elsewhere pointed out, could any part of her separate estate be so taxed.

16. On page 19 of the brief, respondent urges that the so-called "legal fiction" that the survivor of an estate by the entireties secures no enlarged interest or right should not necessarily be determinative of questions of federal taxation, and in support of this cites Lucas v. Earle of the 1929 Term, decided by this court March 17, 1930. Even if individuals by contract cannot escape liability for income taxes it is not believed that this court will sweep aside the common law estate by the entireties "preserved in all its purity" as the court says in the Provident Trust Company case, in order to permit the imposition of an unconstitutional tax.

17. On page 20 respondent again fails to recognize that the surviving spouse after the death of the decedent has obtained nothing which decedent ever had or which ever at any time during the continuance of the estate by the entireties could have been transferred by him. It is true that a property interest existed in decedent up to the moment of his death and that at the moment of his death that property interest was

obliterated, but neither at that moment nor because of that event did anything pass from decedent to survivor which survivor had not previously had, and the practical result of the dissolution of an estate by the entireties is not the transfer to the surviving spouse of an unfettered ownership in fee, but the sole practical result is the obliteration of the interest of the decedent in every element of property which during the continuance of the estate he owned, and what is here involved is not legalism but the very substance of property.

18. On page 21 of the brief respondent urges that if decedent had retained this property until his death its value would have been included in the computation of the estate tax and if he had given it to his wife during his lifetime the gift could have been taxed by an act passed before the date of the gift, but neither of these things as has heretofore been pointed out occurred, and admitting of course that the conveyance he made operated as a gift to his wife and as a retention of a certain interest in property in himself the mere cessation of that interest at his death is not a legitimate occasion for a tax, because nothing passed from him to his wife or anyone else.

19. Respondent urges in the third portion of the brief that the tax involved here is properly measured and is neither arbitrary nor capricious, and it is true as claimed by respondent, that petitioners contend that this statute taxes the adverse interests in the property of the co-tenant. It can hardly be contended that regulations of the Treasury Department will be effective to make constitutional what is unconstitutional and it is clear from the decision in the Coolidge case that a tax can be so capricious and arbitrary as to make any moneys collected under it the taking of

property without due process of law, and as has heretofore been pointed out and as shown in petitioners' original brief, if such a tax is sustained a very large part of the surviving spouse's estate might be taken to pay the tax.

If petitioners are right in their analysis of what actually happens, then the decedent, after the estate was created, retained no control over the unfettered fee which sprung into being at his death. True he had a right of survivorship in the whole. True the property was originally procured through an expenditure by him, but long prior to his death he had divested himself of this property and had created the estate by the entireties, in which from the time of its creation his wife had the same right of survivorship as did decedent, but he never retained any measure of dominion and control over the unfettered fee which immediately arose upon the death of either co-tenant. The analogy here is closer to the four trusts in the Reinecke case, in which the settlor and one trustee held a joint control from the date of the creation of the trust. The court held that since the settlor could not sell or otherwise dispose of the property after the creation of these four trusts unless his co-trustee joined with him, the property covered by the four trusts was not taxable. From the date of the creation by decedent Tyler of the estate by the entireties he and his wife had a joint control over this estate just as the settlor and his co-trustee had in the four trusts in the Reinecke case. Decedent and his wife together could have joined in a deed which would have carried the estate by the entireties, including the unfettered fee, but the decedent alone could not by his deed convey any part of the estate during life nor the unfettered fee after his death any more than the settlor alone could have

altered the four trusts in the Reinecke estate. If, therefore, these trusts are not taxable because the control passed out of the settlor at the date of the creation of the estate, then the estate by the entireties in the Tyler case is not taxable because the husband's control of it passed when the estate was created.

It is surprising to find on page 25 of respondent's brief the argument **ad hominem** that if petitioners' contentions are sustained in those states, and there are many of them, in which estates by the entireties still exist, married taxpayers could very generally evade the estate tax law by putting large holdings of property into estates by the entireties. It is not believed that this court solely for saving to the United States certain taxes which it might otherwise lose ought to be asked to take that fact into its consideration in the determination of such important questions as are here involved, and it is not believed that the cases cited by respondent to the effect that a measure may be valid as a necessary adjunct to a matter that lies within legislative power even though standing alone its constitutionality may have been subject to doubt, go to the length of holding that a statute can be used to supersede the Constitution or to bring within the grasp of Congress as an adjunct to legislation by indirection what Congress has not the power to do directly, nor is it believed that the mere threat of the creation of estates by the entireties by taxpayers should be used as an argument.

May it be suggested for the comfort of respondent, if its chief concern is the loss of revenue, that the sale by the survivor of the much discussed unfettered fee after the death of the decedent may bring in such large returns from the gain on the sale as to offset the loss, if any, due to creation of estates by the

entireties, for undoubtedly the basis on which the gain is to be computed would be the value at the date of the creation of the estate and the value at the date of death or at the time of sale may be many times the value at the date of creation.

In further answer to the argument **ad hominem** we suggest the tax is only postponed, for we have all learned that death and taxes cannot be escaped.

It is again respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should stand.

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CHARLES ELMORE CRO
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No. 428

In the Supreme Court of the United States

OCTOBER TERM, 1929

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, petitioners

v.

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MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition.

The question involved is whether Section 202 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778, is unconstitutional in so far as it requires the value of property held by husband and wife as tenants by the entirety to be included in the gross estate of the deceased spouse for Federal estate tax purposes.

On the same day that the petition for certiorari in the instant case was filed, the Circuit Court of Appeals for the Third Circuit held, in *United States of America* v. *Provident Trust Company of Pennsylvania and Charles Sinkler, Administrators c. t. a. of*

Estate of James K. Young, Deceased, decided October 4, 1929, not yet reported, that Section 402 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278, which is identical in all material respects with Section 202 of the Revenue Act of 1916, here involved, is unconstitutional in so far as it provides for the inclusion in the gross estate of property held by decedent and his wife as tenants by the entirety. While the *Young case* concerned property in Pennsylvania and the instant case relates to property in Maryland, the constitutional question is precisely the same in both cases; and the Government is about to file a petition for certiorari in the *Young case.*

While we believe that the decision of the Circuit Court of Appeals in the instant case is correct, we do not oppose the petition for certiorari, because of the conflict of decisions now existing and the importance of the question involved.

Respectfully submitted.

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NOVEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

APR 9 1930
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 7–21) is reported in 28 F. (2d) 887. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 30–36) is reported in 33 F. (2d) 724.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1929. (R. 36.) Petition for

certiorari was filed October 4, 1929. Certiorari was granted November 25, 1929. (R. 37.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Revenue Act of 1916 imposes a tax upon the transfer of the net estate of every decedent dying after the passage of the Act. Section 202 (c) provides that the gross estate of the decedent shall include the value of property held by the decedent and any other person as "tenants in the entirety," with the exception of such part of the property as may be shown to have originally belonged to the survivor. The questions presented are:

1. Whether this provision imposes a direct tax in violation of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution.

2. Whether this provision is in contravention of the due process clause of the Fifth Amendment.

STATUTE INVOLVED

The Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778, provides in part as follows:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of

every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

* * * * *

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * *

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

* * * * *

By Section 203 provision is made for determining the value of the net estate by deducting certain items and an exemption of $50,000 from the ascertained gross estate. The value of this net estate is the measure of the tax and the amount of deductions allowable in this case is not in dispute.

The Act of March 3, 1917, c. 159, 39 Stat. 1000, and the Act of October 3, 1917, c. 63, 40 Stat. 300, increased the rates of tax but made no other changes in the provision of the 1916 Act in its application to this case.

Regulations of the Treasury Department and extracts from subsequent estate tax statutes are printed in Appendix A, pp. 29–43, *infra*.

STATEMENT

The case was submitted to the District Court upon an agreed statement of facts. (R. 23–25.) So far as material to the issues involved, the facts are as follows: James E. Tyler, a resident of Maryland, died on May 7, 1918, intestate. The petitioners were duly appointed administrators of his estate and are now acting as such. At his death the decedent and his wife were the owners as tenants by the entirety of 349 shares of the capital stock of the Kimball-Tyler Company, a West Virginia corporation doing business in Maryland. The stock was acquired by them by a conveyance from the decedent on November 29, 1917. Prior to that conveyance the decedent was the sole owner of the stock. Its value at the time of his death was $59,183.42, and the Commissioner of Internal Revenue included the stock at that valuation in the gross estate of the decedent, the total of which was $207,454.60.

The petitioners challenged the propriety of this inclusion of the stock in an action brought in the District Court for the District of Maryland to recover the tax paid on account of it, and that court entered judgment for the petitioners in the sum of $3,337.67 with interest. (R. 21.) On appeal, the

United States Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the lower court. (R. 36.) The petitioner thereafter applied to this Court for a writ of certiorari, which was granted. (R. 37.)

SUMMARY OF ARGUMENT

I. The Revenue Acts of 1916 and 1917 provide for inclusion of estates by the entirety in the estate the transfer of which is taxed thereby.

II. This provision does not impose a direct tax and so does not violate constitutional limitations as to direct taxes. Although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a shifting of economic benefits of property upon the decedent's death, occasioned by the death. This shifting may be the subject of an estate tax. The legal fiction that the survivor of an estate by the entirety acquires no enlarged interest or right should not be held determinative here. The "transfer" which may be the basis of a tax should not be restricted to cases where the title or the property passes but may include also the relinquishment by the decedent of possession, enjoyment or control. All the interests of the decedent spouse are terminated at his death; and the practical result of the dissolution of the estate by the entirety by the death of one spouse is to transfer to the surviving spouse an unfettered ownership in fee.

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This Court held in *Bromley* v. *McCaughn*, 280 U. S. 124, that a tax on gifts *inter vivos* is not a direct tax. Upon the principles applied in that case there can be no constitutional objection to a transfer tax payable at death on the value of property owned by the decedent and conveyed by him to himself and wife as tenants by the entirety after the effective date of the Tax Act. If instead of conveying the property he had retained it until his death, its value would have been included in the computation of his estate subject to the estate tax. If he had given it to his wife outright during his lifetime, the gift could have been taxed by an Act passed before the date of the gift. If instead of pursuing either of these courses, he makes a conveyance which operates both as a gift to his wife and as a retention of an interest in the property in himself, the cessation of that interest at his death is a legitimate occasion for a tax.

III. The tax involved here is properly measured and is neither arbitrary nor capricious, and so does not violate the Fifth Amendment. The tax is imposed upon the "transfer of the net estate" and its amount is the sum of certain percentages of the value of the "net estate." It is necessary to set up this artificial entity as the measure of the tax and include therein designated classes of property, in order that certain dispositions of property made by a decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, may be reached. The inclusion of estates by

the entirety in the taxable net estate is necessary to prevent tax avoidance and it may consequently be supported as a necessary adjunct to the taxation of testamentary transfers, even if standing alone its constitutionality might have been subject to doubt.

ARGUMENT

I

THE APPLICABLE STATUTE PROVIDES FOR THE INCLUSION IN THE GROSS ESTATE OF THE VALUE OF THE INTEREST IN THE PERSONAL PROPERTY IN QUESTION HELD BY THE DECEDENT AND HIS WIFE AS TENANTS BY THE ENTIRETY

We submit that subparagraph (c) of Section 202 (p. 3, *supra*) must be so construed.

It is not contended by the petitioners in the instant case that Congress, in enacting Section 202 (c) of the Revenue Act of 1916, did not intend to include in the measure of a decedent's gross estate the value of property held by the decedent and the surviving spouse as tenants by the entirety. The section itself plainly indicates this, though its language is "tenants *in* the entirety" rather than the more widely recognized term "tenants *by* the entirety." (Italics ours.) Both the Circuit Court of Appeals in this case and the Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Provident Trust Co.*, 35 F. (2d) 339, considered such estates as included within the intendment of the section, and the question does not seem pertinent to the issue here raised. See *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348.

Contra, Blount v. *United States,* 59 C. Cls. 328, 347; *Appeal of Susie M. Root,* 5 B. T. A. 696.

The decedent was the sole owner of the stock in question until November 29, 1917, after the passage of the Act under which the tax was assessed. On November 29, 1917, he transferred the stock to himself and his wife as tenants by the entirety (p. 4, *supra*). It does not appear that the wife of the decedent ever before this time had any interest in the stock or that she furnished any part of the consideration for its original purchase. Consequently, there is no ground for applying the exception to Section 202 (c) (p. 3, *supra*). (For the construction of this exception by the Treasury Department see pp. 34–43, *infra.*)

II

THE INCLUSION OF THE INTERESTS OF TENANTS BY THE ENTIRETY IN THE GROSS ESTATE DOES NOT RESULT IN IMPOSING A DIRECT TAX IN VIOLATION OF THE THIRD CLAUSE OF SECTION 2 OR THE FOURTH CLAUSE OF SECTION 9 OF ARTICLE 1 OF THE CONSTITUTION

The constitutionality of the Federal estate tax has been upheld and its nature has been clearly pointed out by this Court. In *New York Trust Co.* v. *Eisner,* 256 U. S. 345, the Court overruled the constitutional objections to the tax and stated that it was an excise tax, "the antithesis of a direct tax."

In *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50, the Court said:

> What was being imposed here was an excise upon the transfer of an estate upon

> death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.

In *Edwards* v. *Slocum,* 264 U. S. 61, 62–63, the Court said:

> But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death." It levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. * * *

The plan of the tax is well stated in *Farmers' L. & T. Co.* v. *Winthrop,* 238 N. Y. 488, wherein the New York Court of Appeals said of the Federal estate tax (p. 497):

> The tax under the statute is a "tax upon the transfer of the net estate of every dece-

dent." The value of the net estate by which this tax is measured not only includes the value of property which the decedent at the time of his death could dispose of by will or deed and the value of property which the decedent has transferred by deed made in contemplation of death, or to take effect in possession or enjoyment upon his death, but also includes the value of interests of others which ripen upon his death into new rights of possession and enjoyment by operation of law, regardless of the wish of the decedent, such as dower rights or interests held jointly *or as tenants by the entirety*. The transfer which is taxed is not the transfer of separate parts of the decedent's estate by a single instrument nor separate transfers by the decedent of his estate but it is the transfer by death of all that property which is defined by the statute as the "net estate" regardless of how the right of the transferees may arise. The definition of the "net estate" identifies the property the transfer of which is taxed and the value of the "net estate" so defined measures the amount of the tax and its rate; but the tax is not imposed upon the property nor in general is the burden of its payment apportioned in proportion to the value of any portion thereof received by any transferee. (Italics ours.)

Nevertheless, it seems to have been suggested that the inclusion in the gross estate, used in computing the amount of the transfer tax, of the value

of property which is not the legitimate subject of a transfer tax would amount to the imposition of a direct tax. *Chase National Bank* v. *United States*, 278 U. S. 327, 334–35.

The contentions of the petitioners as to the validity of the tax in this case rest in ultimate analysis upon the peculiar nature of tenancy by the entirety. Such tenancy is of common-law origin and is based upon the fiction of the unity of husband and wife. It still prevails in Maryland and applies there to personal as well as to real property. *Brewer* v. *Bowersox*, 92 Md. 567; *McCubbin* v. *Stanford*, 85 Md. 378; *Ades* v. *Caplin*, 132 Md. 66.

Upon the death of a holder by the entirety there is not technically, from a conveyancer's point of view, any transfer of title or of estate, since the survivor throughout the tenure has been seized *per tout et non per my*. It is therefore contended by the petitioners that there is no transmission at death which Congress has power to tax. From this premise it is argued that the tax levied in effect is a direct tax upon the estate by the entirety and invalid because violative of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution.

We submit that this assumption is not supported by the realities, and that it is upon the realities that the case must be decided.

On the question here involved there is a conflict of opinion. The Circuit Court of Appeals for the

Fourth Circuit has held in the instant case that under the Revenue Act of 1916 estates by the entirety may properly be included in the computation of the Federal estate tax. The Circuit Court of Appeals for the Third Circuit, on the other hand, has decided in the cases of *United States* v. *Provident Trust Co.*, 35 F. (2d) 339, and *Commissioner* v. *Girard Trust Co.*, 35 F. (2d) 343, Nos. 546 and 547, October Term, 1929, of this Court, which are to follow the instant case in argument, that a provision in the Revenue Act of 1921 similar to that here under consideration is unconstitutional in so far as it requires the inclusion in the gross estate of the decedent's interest in estates by the entirety.

The instant case involves estates by the entirety under the law of Maryland; the cases decided by the Circuit Court of Appeals for the Third Circuit involve estates by the entirety under the law of Pennsylvania, but there is no material distinction between the law of these two States which would justify different results in the three cases.

This Court has not passed upon the taxability of the interests in property held by tenants by the entirety under any of the Federal Estate Tax Acts, but we submit that the situation is governed by principles which have been applied in certain cases decided by this Court as well as in certain cases which, we submit, have been decided correctly by the lower Federal courts.

In *Chase National Bank* v. *United States, supra,* this Court upheld the inclusion in the gross estate

of the proceeds of life-insurance policies payable to beneficiaries other than the decedent's estate, which policies were taken out after the effective date of the Revenue Act in question, and which reserved to the insured the right to change the beneficiary. The Court said (p. 337):

> Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

(p. 338:)

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey,* 205 U. S. 466.

(p. 339:)

> As it is the termination of the power of disposition of the policies by decedent at death which operates as an effec-

> tive transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court upheld the constitutionality of the provision of Section 402 (c) of the Revenue Act of 1921 as applied to two trusts created by the decedent before the passage of any statute imposing an estate tax, in which trusts the income was reserved to the settlor (the decedent) for life and on his death was to be paid to a designated person until the termination of the trust, with the remainders over, and by the terms of which trusts there was reserved to the settlor alone a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him. The Court held that the Act should not be construed to require the inclusion of five other trusts under which the settlor retained no present interest and no power to modify the terms of the trusts. In this case the Court said (p. 348):

> the miscellaneous items of property required by § 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of

> the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer.

Similarly, where, by virtue of a power of appointment, one has a right of disposition of property vested in another, the exercise of that right is a transfer and the property is to be included in his net estate. *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 80A. It was there held that Congress has the power to tax any transmission of property effected by death, even though by the law

of decedent's domicile such property was not a part of his estate. See also, *Minis* v. *United States*, 66 C. Cls. 58, certiorari denied, 278 U. S. 657.

So, also, where an owner of property during his lifetime conveys a vested remainder, reserving possession for his life, upon his death there is a transfer of the remainder and such property is to be included in his gross estate. *McCaughn* v. *Girard Trust Co.*, 11 F. (2d) 520 (C. C. A. 3d). The propriety of such treatment is impliedly recognized by this Court in *Reinecke* v. *Northern Trust Co., supra*, p. 348, where it is said that items of property brought into the gross estate for the purpose of computing the tax "are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death."

The fact that a tenant by the entirety can not divest his spouse of her estate during his lifetime may seem to distinguish the instant case from those involving a power of revocation or appointment. But we submit that this distinction ignores the very circumscribed tenure held by the spouse during her co-tenant's lifetime, which, upon his death, becomes absolute, thus effecting the same shifting of use and enjoyment that flows from the cessation at the death of the holder of the power to revoke or the power to appoint.

Nor is the present case in this respect distinguishable in principle from the cases determining that the dower, curtesy, or equivalent right of a spouse

is properly to be included in measuring the gross estate of a decedent. In several decisions the Circuit Court of Appeals for the Eighth Circuit has sustained such inclusion upon the broad ground that on the death of the decedent there has been a cessation of the right of possession, use, and enjoyment and a consequent shifting of the economic benefits of property. The absence of any right of disposition in the decedent has been held not material. *United States* v. *Waite,* 33 F. (2d) 567, certiorari denied, 280 U. S. 98A. See also *Allen* v. *Henggeler,* 32 F. (2d) 69, certiorari denied, 280 U. S. 72A; *United States* v. *Dietz,* 33 F. (2d) 576; *Crooks* v. *Loose,* 36 F. (2d) 571.

In *Crooks* v. *Loose,* the court answered the contention that the wife gains no enlarged title or estate by saying (p. 573):

> The Federal Estate Tax Law is not concerned primarily with the character of the interest or estate acquired by the beneficiary, or its subsequent status; but the law is primarily concerned with the ceasing of the interest of the decedent in the property, with the "shifting of economic benefits" of property from the decedent. If there is such a ceasing of the interest of the decedent, such a "shifting of economic benefits," the federal estate tax comes into play.

In the case at bar, although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a very

real shifting of economic burdens and benefits of property occasioned by the decedent's death. Such a shifting may be subject to an estate tax. *Chase National Bank* v. *United States, supra; Reinecke* v. *Northern Trust Co., supra. Cf. Saltonstall* v. *Saltonstall,* 276 U. S. 260.

As to the husband, there was a " termination by death" of "legal incidents of property through which its use or economic enjoyment may be controlled." *Chase National Bank* v. *United States, supra,* p. 335. The husband was a joint owner possessing rights equal to those of his wife and was a part of the marital entity owning the property. While he could not convey it or encumber it he could prevent her from doing so, not as to one-half but as to all. All his interest was terminated at his death. The statute reaches the transfer by death of any of the legal incidents of property through which its use or economic enjoyment may be controlled. *Chase National Bank* v. *United States, supra.* This property which originally was his has been transferred absolutely to his wife. It is apparent that the property was not wholly freed of his dominion and control until his death, and we submit that the cessation of his interest partakes of the general characteristics of a testamentary disposition. It seems obvious that under these circumstances there was at death a shifting of economic benefits, for at that time the wife's right to dispose of the property first arose. At that time

there was a change from a joint interest in the income to a sole interest; there was a change from an equal voice in the management of the property to a sole voice; there was a change from the possibility of testamentary disposition to the certainty of the power of testamentary disposition; the contingency of the husband's survivorship was removed and the wife's right became absolute for the first time.

Furthermore, the legal fiction, prevailing in the State in which decedent had his domicile, that the survivor of an estate by the entirety secures no enlarged interest or right should not necessarily be determinative of questions of Federal taxation. *Weiss* v. *Wiener,* 279 U. S. 333; *United States* v. *Robbins,* 269 U. S. 315, 327; *Burk-Waggoner Association* v. *Hopkins,* 269 U. S. 110. Cf. *Lucas* v. *Earl,* No. 99, October Term 1929, decided by this Court March 17, 1930.

Questions of taxation are eminently practical and, as this Court has said, they are to be determined by the real substance of the transaction and not by its mere form. *Eisner* v. *Macomber,* 252 U. S. 189, 211; *Weiss* v. *Stearn,* 265 U. S. 242, 254. See also *Nicol* v. *Ames,* 173 U. S. 509, 515.

Applying this principle, it is apparent that a taxable transfer occurred upon decedent's death, and that the legal fictions recognized as existing within a State can not be allowed to curb or cripple the taxing power of Congress. Analysis

of the Estate Tax Act makes clear the intention of bringing within its scope all property as to which there is a transfer of use or economic benefit upon the death of a decedent. This inclusiveness is limited so as to apply only to that part of the property which originally belonged to decedent or was purchased solely with his money. (See pp. 22–23, *infra*. Thus the effect of the creation of the tenancy by the entirety is the initial step in the gift from the owner to the spouse, which is completed by the donor's death, for, until death, it could not be ascertained whether the spouse could ever take the property.

The Federal Estate Tax Act deals only with interests and properties of individuals as natural persons. It resolves into their individual elements the interest of the decedent member of the fictional entity and its realization in the survivor. The statute deals with actualities, and no common-law fiction or State enactment can either conceal or obliterate the actual transference to the surviving member of the "entity" of rights and benefits that she previously had shared with the one who has died. Whatever the form, the fact is that a property interest existed in decedent up to the moment of death and at that moment and because of that event it passed to the survivor.

The practical result of the dissolution of an estate by the entirety is to transfer to the surviving spouse an unfettered ownership in fee by the death of the grantor of the estate. Estimating the law by that

result, it is plain that a transfer is occasioned by the death of the grantor irrespective of any legalism which leads to the abstract conclusion that there was no such transfer. The Act must "at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." *Chase National Bank* v. *United States, supra,* p. 337.

This Court held in *Bromley* v. *McCaughn,* 280 U. S. 124, that a tax on gifts *inter vivos* is not a direct tax. Upon the principles applied in that case there can be no constitutional objection to a transfer tax payable at death on the value of property owned by the decedent and conveyed by him to himself and wife as tenants by the entirety after the effective date of the Tax Act. If, instead of conveying the property, he had retained it until his death, its value would have been included in the computation of his estate subject to the estate tax. If he had given it to his wife outright during his lifetime, the gift could have been taxed by an Act passed before the date of the gift. If, instead of pursuing either of these courses, he makes a conveyance which operates both as a gift to his wife and as a retention of an interest in the property in himself, the cessation of that interest at his death is a legitimate occasion for a tax.

There is a clear relation between a decedent's interest in an entirety and his interest in other

property which ceases at death. Congress has deemed it proper to include such property in the measure of the gross estate in the same way as that disposed of by direct testamentary disposition. Thus it is merely carrying out logically the collection of revenue from the sources made available under the decisions of this Court in *Knowlton* v. *Moore,* 178 U. S. 41, and *New York Trust Co.* v. *Eisner,* 256 U. S. 345, *supra.*

In view of the foregoing it is submitted that the Circuit Court of Appeals in referring to the practical incidents of a tenancy by the entirety was well justified in saying (R. 34):

> To deny that there is a transfer of property in such case resulting from death, is to lose the substance of legal rights while grasping at the shadow.

III

THE TAX INVOLVED HERE IS PROPERLY MEASURED AND IS NEITHER ARBITRARY NOR CAPRICIOUS

It is also contended by petitioners that the tax as measured is so arbitrary and capricious as to amount to confiscation, and thus is in violation of the Fifth Amendment to the Constitution. (Br., pp. 16–17.)

Reference is made to the fact that Section 202 (c) levies a tax upon the estate of one tenant by the entirety measured by the value of the entire property held by both tenants by the entirety "except such part thereof as may be shown to have

originally belonged to such other person and never to have belonged to the decedent." Petitioners contend that the statute thus taxes the adverse interests in the property of the cotenant.

This exception was construed by regulations of the Treasury Department to apply to property owned by the husband and wife as tenants by the entirety and to exclude from the gross estate that proportion of such property which the contribution of the survivor to the purchase price bore to the entire purchase price, or, in case the property was conveyed to the husband or wife without valuable consideration, one-half of the total value of the property. (See pp. 34–43, *infra*.)

When Congress fixed as the measure of the tax "the value of the net estate," it is clear that the rate of the tax was not meant to depend solely upon the transmission by death, *i. e.*, upon the occasion of the tax, but also upon dispositions of property related to that occasion. The tax is imposed upon the "transfer of the *net estate*," and its amount is the sum of certain percentages of the *value of the net estate*. It was necessary to set up this artificial entity as the measure of the tax and include therein designated classes of property, in order that certain dispositions of property made by a decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, might be reached.

Accordingly, while death is the generating source of the tax, there is included in its measure certain transactions made during the lifetime of a decedent. This is permissible where the transactions bear a substantial relationship to the occasion of the tax. See *Nichols* v. *Coolidge*, 274 U. S. 531, 542.

What the Act measures is the value of property which originally belonged to the decedent and over which he retained a measure of dominion and control until his death. During his lifetime he was seized of an entire estate in the entire property and he had a right of survivorship in the whole. The property was procured through an expenditure by him and his death alone is the occasion for the tax. In the only case in which this Court has held that a provision of a Federal Estate Tax Act violates the Fifth Amendment, it nevertheless recognized that Congress may require that property which has been transferred before death to avoid the tax may be treated as part of the estate. *Nichols* v. *Coolidge*, *supra* (p. 542). We submit that it is equally appropriate to measure the tax here by the value of the property which has been freed from the burden of the husband's control and right of survivorship by his death. When the decedent caused his own property to be conveyed to himself and his wife as tenants by the entirety, he in effect made a contingent gift to his wife of the fee simple of that property, which was not fully effective until his death.

Finally, it is clear that without some such provision as paragraph (c) of Section 202, *supra,* married taxpayers, in States where tenancy by the entirety exists, could very generally evade the estate tax law by putting large holdings of property into estates by the entirety. It is the plain intent of the law to prevent this avoidance of tax and to secure to the Government its revenue whenever decedent's interest in property of any kind ceases by reason of death.

This Court has often recognized that a measure may be valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitutionality may have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Ruppert* v. *Caffey,* 251 U. S. 264, 289; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560.

If this statute falls, the cases of testamentary disposition of property among married taxpayers through the creation of estates by the entirety will be many. Therefore, in further support of this statute, the Government relies upon the broad ground that it is an integral part of an entire taxing scheme found necessary by Congress in satisfying the needs of the Government for revenue. This principle was given affirmation in the case of *Taft* v. *Bowers,* 278 U. S. 470, wherein it was held that the provision of Section 202 (a) (2) of the Revenue Act of 1921, which required the donee to use the cost of the property to the donor

as a basis for computing profit for income-tax purposes, is constitutional so far as it taxes to the donee, as income, increment in the value of a gift which accrued prior to its acquisition by the donee. In its opinion the Court said (p. 482):

> The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily.

The property, the value of which petitioners contend should not be included in the gross estate, belonged to the decedent until after the passage of the applicable Tax Act. The tenancy by the entirety in this property was created after that Act became effective. Certainly the Act, in so far as it relates to such property, is free from constitutional objections. *See Lewellyn* v. *Frick*, 268 U. S. 238; *Shwab* v. *Doyle*, 258 U. S. 529. *Cf. Knox.* v. *McElligott*, 258 U. S. 546; *Blount* v. *United States*, 59 C. Cls. 328, appeal dismissed on motion of the Solicitor General, 273 U. S. 769.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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APRIL, 1930.

APPENDIX A

STATUTES

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777–778) in Title II (Estate Tax) provided in part:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.
>
> * * * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 324) increased the rates of the Estate Tax but made no other changes in this tax.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1097) in Title IV (Estate Tax) contained the same provision except that it was renumbered to be Section 402 (d).

The Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 278) in Title IV (Estate Tax) provided in part:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;
>
> * * * * *

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then

to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

In the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 70–71; U. S. C. App., Title 26, Sec. 1094) in Title III (Estate Tax) Section 302 (e) is the same as Section 302 (e) in the Revenue Act of 1924, set out above, except that in the two places in which it appears the phrase "a fair consideration" is replaced by the phrase "an adequate and full consideration"; and Section 302 (h) is the same in the two Acts, except that in the Revenue Act of 1926, the words "Except as otherwise specifically provided therein" are inserted at the beginning of the subsection.

No changes were made in this provision by the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791).

CONGRESSIONAL COMMITTEE REPORTS

Revenue Act of 1921

In the Report of the Committee on Ways and Means, House Report No. 350, 67th Cong., 1st sess., it was said (p. 15):

TITLE IV.—ESTATE TAX

Sections 401 to 404, inclusive, would clarify some doubts which have arisen under the revenue act of 1918 with regard to the estate tax and also make a few substantive changes in the law. Section 401 [402?] liberalizes the law as it relates to property held jointly or as tenants in the entirety by the decedent and any other person. * * *

In the Report of the Committee on Finance, Senate Report No. 275, 67th Cong., 1st sess., it was said (p. 24):

TITLE IV.—ESTATE TAX

* * * * *

Section 402 (d) removes the uncertainties in the existing law relating to interests held jointly or as tenants in the entirety, and conforms to the construction which has been given this section by the Bureau of Internal Revenue.

Revenue Act of 1924

In the Report of the Committee on Finance, Senate Report No. 398, 68th Cong., 1st sess., it was said (p. 35):

Section 302 (e): The provisions of the House bill and the existing law have been reworded to secure greater clarity.

Section 302 (h): This subdivision provides that the property interests which are included in the gross estate for purposes of the estate tax are those enumerated in this section, whether such interests were created or arose or were relinquished before or after the enactment of this act.

A similar provision is included in subdivision (c) [relating to trusts] of section 402 of the existing act [Revenue Act of 1921].

> It has seemed desirable to extend this provision expressly to the other property interests set forth in this section.

In the Conference Report, House Report No. 844, 68th Cong., 1st Sess., it was said (p. 25):

> The provision of the House bill with reference to that part of the gross estate made up of property held by the decedent as a joint tenant or as a tenant by the entirety has been reworded for purposes of clarity. * * *

REGULATIONS

Regulations No. 37 (1916 ed.), promulgated October 10, 1916, under the Revenue Act of 1916, provided in part:

> ART. IV. The gross estate of a decedent, as defined in Section 202 [of the Revenue Act of 1916 (p. 29, *supra*)], includes:
>
> * * * * *
>
> PROPERTY OWNED JOINTLY
>
> (3) Decedent's share in joint bank accounts or in any other property owned by decedent jointly with another or with others as tenants in entirety. Only such part of such property as can be shown never to have been owned by the decedent can be excluded from his gross estate.

Extract from Treasury Decision 2450, being a letter of February 14, 1917, signed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury:

* * * * *

> You will note that, under section 202, paragraph C, there is required to be included in the gross estate of a decedent all the interest held jointly or as tenants in the en-

tirety by the decedent and another person, "except such part thereof as may be shown to have *originally* belonged to such other person and never to have belonged to the decedent." Under this paragraph of the taxing act, wherever the public records show property in the name of the decedent, the presumption is that it was the sole property of the decedent, and the burden of proving that another person owned, prior to the decedent's death, any interest therein is not upon the Government but is upon the estate.

You will note the extremely limiting terms of the paragraph quoted above, and that it must be shown that any part of the property to be excluded from the gross estate must have actually belonged in the first instance to a person other than the decedent and that it has never been owned by the decedent. If, under the Texas law, property conveyed to a husband or wife during their marriage is taken by each in entirety and in such a manner that it could not be contended that any specific part belonged to either, but that each was the owner of all, and upon the death of either no new interest or title vested in the survivor, as is the case in some States, the Government, under a strict and technical interpretation of paragraph C of section 202, would perhaps be justified in demanding that the whole of the property thus owned be included as a portion of the gross estate of the decedent. This, however, does not seem to have been the intent of Congress, and it has heretofore been ruled in a similar case that one-half of the property thus jointly owned should be returned as a portion of the gross estate of the decedent husband or wife, as the case might be.

* * * * *

Regulations 37 (1919 ed.), promulgated August 8, 1919, under the Revenue Act of 1918, and as revised in January, 1921, provided in part:

ART. 27. *Property held jointly or as tenants in the entirety.*—The statute provides for the taxation of interests held jointly, or as tenants in the entirety, by the decedent and any other person or persons. This class of property includes all interests, whether in real or personal property, in which the survivor takes the entire property by right of survivorship, and it consequently does not form part of the decedent's estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes to his estate, free from any right of survivorship.

The following are examples of this class of property: Real estate held jointly; real estate held by husband and wife (known as an estate in the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; joint trading accounts with brokers; stocks and bonds held in the joint names of several owners.

[This Article was amended by Treasury Decision 3951 (see pp. 42–43, *infra*), effective December 29, 1926.]

ART. 28. *Taxable portion.*—The value of such property to be returned for tax is the value of the entire property, unless it can be shown that part of it originally belonged to the other joint owner and never belonged to the decedent. In order to exclude any part of such property from the gross estate the executor must show an original contribution of value by some person other than the decedent. If such a contribution can

be established, the proportion thereof to the entire purchase price represents the interest in the property which should be excluded from the gross estate. Three cases may arise: (1) The decedent may have paid the entire purchase price, in which case the entire property should be included; (2) the decedent may have paid only a portion of the purchase price, in which case only a corresponding portion of the property should be included; (3) the decedent may have paid no part of the purchase price, in which case no part of the property should be included. In the case of bank deposits, the same rule applies; that is, the interest of the decedent in the account is determined by the amount of his contribution. For example: An account of $1,000 is opened, of which the decedent contributes one-half. Interest of $40 has accumulated at the time of the decedent's death, and nothing has been withdrawn. Under these facts $520 should be included in the gross estate.

ART. 29. *Husband and wife.*—Property owned by husband and wife as tenants in the entirety is governed by the rule given above. The whole value of the property must be included, in the absence of a showing as to the original contributions. An exception is made, however, where property is conveyed to husband and wife without valuable consideration, or where the property was purchased out of common funds, representing the savings of husband and wife, or was the fruit of joint labor, the proportion of the several contributions having been lost sight of. In such cases one-half of the total value of the property should be returned.

[This Article was revoked by Article 106 of Regulations 63 (see p. 41, *infra*).]

Regulations 63, promulgated under the Revenue Act of 1921, provided in part:

ART. 23. *Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons, and of estates by the entirety. This class of property includes all interest, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

[This Article was amended by Treasury Decision 3951 (see pp. 42–43, *infra*), effective December 29, 1926.]

ART. 24. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were de-

cedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes

a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (*a*) The decedent may have furnished the entire purchase price, in which case the value of the entire property should be included in his gross estate; (*b*) the decedent may have furnished a part only of the purchase price, in which case only the value of a corresponding portion of the property should be so included; (*c*) the decedent, prior to acquisition of the property by himself and the other joint owner, may have given to the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, in which case the entire value of the property should be included; (*d*) the other joint owner, at a date prior to the acquirement of the property, may have acquired from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became as such, or in a converted form, part of the purchase price of the property. In such a case, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (*e*)

the decedent may have furnished no part of the purchase price, in which case no part of the property should be included; (*f*) the decedent and spouse may have acquired the property by will as tenants by the entirety, in which case one-half of the value of the property should be included.

ART. 106. * * * Regulations 37 (revised January, 1921) remain in full force and effect, subject to the following changes:

* * * * *

Articles 29 [and others] are revoked.

Regulations 68, promulgated under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Article 23 of Regulations 68 is substantially the same as Article 24 of the Regulations 63, quoted *supra*, pp. 38–41.

Articles 22 and 23 of Regulations 70 (1926 ed.), promulgated August 24, 1926, under the Revenue Act of 1926, are the same as Articles 22 and 23 of Regulations 68, *supra*.

Treasury Decision 3951, approved December 29, 1926, reads as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, are hereby amended to read as follows:

Property held jointly or as tenants by the entirety.—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons, and of estates by the entirety: This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the revenue act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to

either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

These amendments apply only to the estates of decedents who died prior to the effective date of the revenue act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926:

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4248, promulgated November 23, 1928, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved November 23, 1928:

A. W. MELLON,
Secretary of the Treasury.

In Regulations 70 (1929 ed.), promulgated March 23, 1929, under the Revenue Act of 1926 as amended by the Revenue Act of 1928, Article 23 of the former edition remains unchanged, but Article 22 is amended by adding at the beginning a sentence incorporating Treasury Decision 4248, *supra.*

Appendix B

English and New York Statutes and Decisions

The treatment of tenancies by the entirety by the Federal Government is similar to the treatment of such interests in England.

The Finance Act, 1894 (57 & 58 Vict. c. 30), created what is called an estate duty. That Act provides in Section 2 that the tax should be imposed on all property, real or personal, "which passes on the death" of every person dying after the enactment of the law. In a note to this section found in Hanson, Death Duties (7th ed.), p. 63, the following appears:

> The "passing" may also result from the legal position of two persons to each other. Thus, husband and wife, married before the Married Women's Property Act, 1882, were tenants by entireties of real estate devised to them during their lives or the life of the longest liver. During the joint lives the husband alone was entitled to the rents, and the wife had no equity to a settlement (*Ward* v. *Ward*, 14 Ch. D. 506). Therefore, on the husband's death, after the 1st August, 1894, duty is payable on the whole property, as passing on his death.

It thus seems apparent that England, in the administration of the estate duty, has disregarded the common-law fiction with respect to estates by the entirety (prior to the abolition of such estates by the Married Women's Property Acts) and has supported the view that such estates "passed" very

largely upon the same considerations as are here urged by the Government, namely, that valuable rights ceased upon the husband's death with a consequent legal and factual enlargement of the wife's interest.

So also does the New York state transfer tax law, which is based "upon the transfer" of any property, require an inclusion of estates by the entirety among transfers by death. By N. Y. Laws 1915, c. 664, enacting subdivision 7 of Section 220 of Chapter 60 of the Consolidated Laws, it was provided that estates by the entirety should be subject to the estate tax in the same manner as though the whole property belonged absolutely to the deceased tenant by the entirety. This provision was amended by N. Y. Laws 1925, c. 143, to provide that the tax in the case of a tenancy by the entirety should be assessed as though one-half of the property belonged to the deceased tenant by the entirety. This amendment also renumbered the provision, making it Section 220 (5) of Chapter 60 of the Consolidated Laws.

The New York courts have held that the 1915 amendment is not retroactive (*Matter of Lyon,* 233 N. Y. 208), but that, as to a tenancy by the entirety created after the effective date of the Act the tax is valid and is to be imposed upon the entire estate held by the tenants by the entirety as if the whole had passed by will. *Matter of Lyon, supra; Matter of Dunn,* 236 N. Y. 461.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1929.

No. 428.

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF EDWARD H. BLANC AND RUSSELL L. BRADFORD, AS *AMICI CURIAE,* AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY.

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae,
43 Exchange Place,
New York City, New York.

PRINTED IN THE UNITED STATES BY B. H. TYRREL, INC., 110 GREENWICH STREET, NEW YORK.

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Supreme Court of the United States,

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No. 428.

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,
Petitioners,
against
THE UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for City Bank Farmers Trust Company, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Counsel for the City Bank Farmers Trust Company,
as *Amici Curiae.*

Supreme Court of the United States,

OCTOBER TERM—1929.

No. 428.

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,
Petitioners,
against
THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of the counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of the City Bank Farmers Trust Company of New York as executor of estates wherein the question presented in this case is involved.

This case involves the question of whether the value of property in which the decedent had an estate by the entirety may be included as a part of the gross estate of the decedent for the purpose of the imposition of the Federal estate tax under Title II of the Revenue Act of 1916.

The facts in this case, and which are not disputed, are set out on pages 2 and 3 of the briefs for the petitioners. (See also R. 23). The tenancy by the entirety was cre-

ated on November 29th, 1917, and the decedent, James E. Tyler, died on May 7th, 1918.

The cases of *United States of America* v. *Provident Trust Company*, Docket No. 546, and *Commissioner of Internal Revenue* v. *Girard Trust Company* and *Joseph L. Woolston, Executors of the Estate of Beulah H. G. Woolston, Deceased*, Docket No. 547, are pending before this Court and are set down for argument immediately after the case in suit.

The arguments advanced herein in support of the contentions of the petitioners are likewise advanced in support of the contention of the respondents in the two above entitled cases.

Argument.

We shall address our observations in respect of our conception of the power of the Congress to impose an estate tax or death duty upon the value of property not transferred by the decedent at or by reason of his death, or the power to provide that the value of property not transferred at or by reason of death may be employed as a measure of a tax upon property so transferred, to the following points and in the following order:—

1. The tax laws of the United States should be applied consonantly with the laws of property of the several states.
2. The statute as sought to be applied to property held by the entirety is an unapportioned direct tax, and therefore unconstitutional.
3. The statute as applied is in violation of the Fifth Amendment of the Constitution.

The Federal estate tax is a death duty imposed upon the transfer at or by death of property owned by a decedent or in which he had a property interest at death. Death under any circumstances must be "the generating

source from which the particular taxing power takes its being". *Knowlton* v. *Moore*, 178 U. S. 41, 56 (1900).

The tax under the Federal Estate Tax Act of September 8th, 1916, as amended October 3rd, 1917, like the subsequent Federal Estate Tax Acts, is not a transfer, succession, legacy, inheritance, or gift tax, but is an *estate* tax. (*New York Trust Company* v. *Eisner*, 256 U. S. 345, [1921]; *Greiner* v. *Lewellyn*, 258 U. S. 384 [1922]; *Y. M. C. A. of Columbus* v. *Davis*, 264 U. S. 47 [1924]; *Edwards* v. *Slocum*, 264 U. S. 61 [1924]; *Nichols* v. *Coolidge*, 274 U. S. 531 [1927]; *Chase National Bank* v. *United States*, 278 U. S. 327 [1929]; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 [1929]). The occasion of the tax *is the transfer* of property at or by reason of death. (Sec. 201 of the Revenue Act of 1916 as amended).[1] The obligation for the payment of the tax is upon the decedent's personal representatives and is collectible from "the property of the decedent" (Secs. 207 and 208). The value of the property the transfer of which is subjected to the tax is the value thereof as of the date of death (Sec. 202).[2]

If the estate be insolvent the tax is not payable by or collectible from the surviving tenant by the entirety (See Secs. 208 and 209 and cf. *Nichols* v. *Coolidge*, supra, p. 542, and *Levy* v. *Wardell*, 258 U. S. 542 [1922] and *Frew* v. *Bowers*, 12 Fed. [2d] 625). If the estate be solvent it is liable for the full tax, including that imposed upon the value of the property seized by the entirety, or property transferred prior to death. (See *Farmers' Loan and Trust Company* v. *Winthrop*, 238 N. Y. 488, 496, certiorari denied 266 U. S. 633).

Such briefly is the framework of the statute. Under such a statute may the estate of the decedent be made to bear a tax measured not by the value of that estate only but by the value of property belonging to another *per tout et non per my* superimposed upon the value of the property of the estate, and a graduated tax applied to the

combined values? Even assuming (See *Nichols* v. *Coolidge*, supra, pp. 540-1) the tax is imposed upon the so-called transfer of the estate by the entirety, may the estate of the decedent be forced to bear the burden of a tax reckoned upon the value of such an estate by the entirety as of the date of death of one of the tenants, instead of the value at the date of acquisition or the date of the transfer to the tenants by the entirety. These preliminary questions involve the issue of whether there is a transfer at all at or by the death of one of the tenants by the entirety.

POINT I.

The tax laws of the United States should be applied consonantly with the laws of property of the several states.

We take it that Congress may not say that there has been a transfer of property upon the death of one tenant by the entirety if it be the settled law of property of the state of domicile of the tenant (or of the state where the property is located, if it be realty or tangible personalty), that there is no transfer. (*Clarke* v. *Clarke*, 178 U. S. 186 [1900]; *De Vaughn* v. *Hutchison*, 165 U. S. 566, 570 [1897]; *United States* v. *Title Insurance and Trust Company*, 265 U. S. 472, 486 [1924]; *Edward Hines Yellow Pine, Trustees*, v. *Martin, et al.*, 268 U. S. 458 [1925]).

In the *Edward Hines Yellow, etc.*, case, the Court, through Mr. Justice STONE said at p. 464:—

> "To avoid the uncertainty and injustice which result from 'the discordant element of a substantial right and which is protected in one set of courts and denied in the other, with no superior

---

1. See corresponding Sections of the Revenue Acts of 1918, 1921, 1924, 1926.
2. And corresponding Sections of the Acts of 1918, 1921, 1924 and 1926.

> to decide which is right' (*Brine* v. *Insurance Company*, 96 U. S. 627), this Court has not hesitated, when there has been a conflict of decision between it and the state courts affecting a rule of property within the State, to overrule its own decisions and to follow the state decisions, once it has become evident that they have established a 'rule of property' as the settled law of the State."

If there be no transfer under the law of Maryland upon the death of a tenant by the entirety to the surviving tenant or anyone else, an act of Congress may not create a transfer, or say that a transfer has occurred when there has been no property transferred. To do so would mean not only changing the law of property of a state in order to subserve the purposes of Federal revenue, but it would be in effect legislating a fact which otherwise by the law of property of the State is not a fact. (Cf. *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240 [1926]).

The Federal courts have given recognition to the property laws of the several states in the interpretation and application of Federal taxing statutes. (Cf. *United States* v. *Robbins*, 269 U. S. 315 [1926]; *Bender* v. *Pfaff*, C. C. A. Fifth Cir., Commerce Clearing House Standard Federal, Tax Service for 1930, Vol. III, p. 8380, unreported officially as yet; *Hopkins* v. *Bacon*, C. C. A., Fifth Circuit, ibid 8382. See also *Keith* v. *Johnson*, 271 U. S. 1.)

There is no transfer of property upon the death of a tenant by the entirety to the surviving tenant. That estates by the entirety exist in Maryland is adequately pointed out in the brief of counsel for the petitioners, is reflected in the opinion of the District Court in the case in suit (28 Fed. (2d) 887) and, we take it, is not disputable here.

POINT II.

The statute as sought to be applied to property held by the entirety is an unapportioned direct tax, and therefore unconstitutional.

If there be no transfer of property or a property right or property interest at or by death there can be no tax. As an excise the tax must fasten upon some excisable occasion. (*Knowlton* v. *Moore,* 178 U. S. 41). This Court, at p. 78, in speaking of death duties as a duty and not a direct tax, said:—

> "Of course, they concern the passing of property by death, *for if there was no property to transmit there would be nothing upon which the tax levied on the occasion of death could be computed.*" (Italics ours.)

Again, at p. 57:—

> "Confusion of thought may arise unless it be always remembered * * * that, fundamentally considered, *it is the power to transmit or the transmission or the receipt of property by death which is the subject levied upon by all death duties.*" (Italics ours.)

A transfer is a condition precedent to the tax. "The statute in terms taxes transfers." (*Chase National Bank* v. *United States,* 278 U. S. 327, 334 (1929)). If no property is transferred at the date of death there could be no tax, unless the statute be construed to tax the transfer made prior to death, which it can not be (*May* v. *Heiner,* decided April 14, 1930). Mere cessation of a property interest or right at death is not an excisable occasion unless there is at the same time a transfer of that property interest or an extinguishment of an exclusive power of disposition at that time. (*Reinecke* v. *Northern Trust Co.,* 278 U. S. 339 (as to five trusts); *Farmers' Loan and*

Trust Co. v. *Bowers*, 29 Fed. [2d] 14 (C. C. A. 2nd); *Hill* v. *Nichols*, 18 Fed. [2d] 139 (D. C. Mass.)). The lower courts, we respectfully submit, have misapprehended the language of this Court as employed in the *Chase National Bank* case, *supra*, wherein, at p. 334, it was said:—

> "Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred *or which ceases at death.*" (Italics ours.)

This language, as we understand it, was not intended to hold that a mere cessation of a property right or interest, without a concurrent transfer thereof constituted a taxable occasion unless the cessation was of a power and control of disposition. This is quite obvious when we consider the purchase of an annuity for life, which property right or interest ceases at death, but which is transferred to no one. There is no tax upon such an occasion. From a reading of the language of this Court in the three above indicated cases, the Court had in mind the cessation of an interest or a right which was transferred at death, not to the mere extinguishment of an interest or right, for the Court says in one place that the tax is "on the privilege of transferring the property of a decedent at death * * *", (*Chase National Bank* case) and in another that "what was being imposed here was an excise upon the transfer of an estate * * *", (*Y. M. C. A.* case) and again "in its plan and scope the tax is one imposed on transfers at death or made in contemplation of death *and is measured by the value at death of the interest which is transferred.* * * * It is not a gift tax. * * * (*Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 347 [1929]). (Italics ours.)

Therefore, when one speaks of the tax being sustainable upon the occasion of a cessation of a right or inter-

est in property it carries with it necessarily the signification that there is a transfer of the thing, interest or right of which there has been a cessation by the decedent or an extinguishment of a power of disposition, such as a power to revoke, etc.

Upon the death of one of the tenants of an estate by the entirety there is no transfer from the decedent to the surviving tenant or to anyone else. The surviving tenant has no more nor less property a moment after the death of the co-tenant by the entirety than was had a moment prior thereto. True, the veto power of the deceased tenant upon the disposition of the property no longer obtains. But this is not a transfer of a property right or a property interest, it is a mere extinguishment of the veto power. It rightfully cannot be said, with a proper recognition of the law in respect of estates by the entirety, that the uses or enjoyment of the property are transferred to the survivor, because under the law of the land the surviving tenant had all of those rights prior to the death of the co-tenant. That the surviving tenant upon the death of the co-tenant has a more valuable property than was had before does not constitute a transfer of *anything* from the deceased co-tenant to the surviving co-tenant, any more so than the expiration of a leasehold upon too low a rental reserved constitutes a transfer of the property to the landlord. The leasehold merely ceases to exist. At once the value of the property is enhanced because of the possibility of an increased rental or use of the property. The mere fact that the value of the property is increased by the extinguishment (not the transfer) of an interest or right in property, may not be held to be a taxable occasion if the tax is upon a transfer.

If we apply the last expression of this Court as employed in *Reinecke* v. *Northern Trust Company*, supra, that "the miscellaneous items of property required by

Section 402 [here Section 202] to be brought into the gross estate for the purposes of computing the tax" imposed by Section 401 (here Section 201) are transfers "in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death", to the case in suit, it would seem clear that upon the death of one of the tenants of an estate held by the entirety, there can be no tax. (See *May* v. *Heiner*, supra.) True, the co-tenant dying had the enjoyment of the property, but so to an equal degree did the surviving tenant. "Control" must clearly mean exclusive control, a right of disposition (*Reinecke* v. *Northern Trust Co.*, supra); *Farmers' Loan and Trust Co.* (*Astor trusts*) v. *Bowers*, 29 Fed. [2d] 14 (1928). This the decedent did not have.

Therefore, we may say there has been no transfer at death of any property or property right; and if there be no transfer there can be no tax. (*Matter of Lansing*, 182 N. Y. 238 (1905). It must follow then that the tax is upon the transfer that occurred prior to death. But this is not a gift tax nor a tax upon *inter vivos* transfers. There was no tax upon the transfer at the time of the transfer. The statute does not contemplate a tax upon the value of the property transferred as of the time of the transfer. No return is required of such a transfer unless death shall occur. The values, used to admeasure the tax and determine the rate are not those at the time of the transfer. They are the values at death which may be a hundredfold those at the time of the transfer. (*Nichols* v. *Coolidge*, supra; *Frew* v. *Bowers*, supra.) It contemplates, and its provisions are specific, a tax upon a transfer at death and a collection of the tax from the estate of the decedent. The property retained and continued to be held by the surviving tenant by the entirety is not a part of the estate of the decedent.

The tax then is of what kind? If it be collected, as the Government has sought to collect it, from the estate

of the decedent, it is a direct tax upon the estate of the decedent and ultimately upon the recipients of his bounty under his Will or his heirs and distributees.

The decedent having once made the transfer of the property to himself and wife as tenants by the entirety is helpless to undo the transfer. The property is irrevocably transferred. It is not subject to any power of disposition by him nor is it subject to his individual debts or obligations. It belongs to someone else by the whole and not by the moiety. Nor is the transfer incomplete until death, or subject to change by the transferror. The thing that was transferred was in fact and in law transferred prior to death, and the tax is on the transfer of the corpus or principal and not upon the life use. But even so, here the life use also had been transferred to another, as much so as it had been retained.

If there be no transfer at or by death *of the whole* of the property, the *value of which whole* has been the basis of the tax, then the tax is a direct tax, within the provisions of Section 2, Clause 3, and Section 9, Clause 4, of Article I of the Constitution of the United States as those sections have been construed by the Courts. It is a direct tax upon the estate of the decedent because of the former ownership of the property by the decedent, and not because there was a transfer of the property to the estate of the decedent or to any one else at his death; or the statute imposes a direct tax upon the surviving tenant or the property of the surviving tenant solely because of the ownership thereof. This, this Court has said in *Pollock* v. *The Farmers' Loan and Trust Company*, 157 U. S. 429, 158 U. S. 601, may not be done. It again said in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294 (1921), through Mr. Justice Brandeis, that "to levy a tax by reason of ownership of the property is to tax the property". In that case the tax was upon the right of removal of whiskey from bonded warehouses where the

law required it to be stored, and this Court held that to tax this right was to tax the property itself.

True, the Congress has a right to impose a tax upon this property or upon the value thereof but unless that tax is apportioned in accordance with the provisions of the Constitution it is an invalid imposition. True, likewise, the Congress may impose a tax upon the transfer by the original transferror (*Bromley* v. *McCaughn*, 280 U. S. 124), but this would be a gift tax. But we venture the opinion that the tax would be unconstitutional if the measure thereof (the value) was the value of the property five, ten or twenty years thereafter, to be collected when the donor died, from his estate. Such a law in effect would be an embargo or prohibition against alienation of property, and would be so whimsical and capricious as to offend against the Fifth Amendment. (That the statute in suit likewise is offensive to the Fifth Amendment will be referred to in another point in this brief).

If the estate of the decedent were insolvent there would be no tax, and if one were sought to be collected it would fall upon the surviving tenant by the entirety, or the property of such surviving tenant, and thus would be a tax, (if there be no transfer at death) upon that surviving tenant solely because of ownership thereof. If the estate be solvent, the tax will fall not upon the surviving tenant or the owner of the property, but will fall upon the estate of the decedent and would be a direct tax within the purview of the Constitution of the United States in that it would be a tax upon the estate by reason of the former ownership of the property by the decedent, or it would be a tax upon the estate of the decedent by reason of the ownership of property by another or third party, the value of which is sought to be taxed, to the estate of the decedent. In either case, or from any angle from which the incidence of the tax is viewed, its impact is direct, unavoidable, constitutes an absolute demand, and has its

basis only in the ownership of property and not the transfer thereof.

A stamp tax imposed by a state upon Federal bonds is a direct tax upon Federal bonds (*McCulloch* v. *Maryland*, 4 Wheat. 316 (1819)). A state tax upon the occupation of an importer is a tax upon imports. (*Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 419 (1827)). A state tax upon charter parties or insurance policies or ships' manifests is a tax upon exports. (*U. S.* v. *Hvoslef*, 237 U. S. 1 (1915); *Thames etc. Insurance Co.* v. *United States*, 237 U. S. 19 (1915); *N. Y. etc. S. S. Co.* v. *United States*, 125 Fed. 320 (1903). Congress may not regulate by means of taxation what it may not control directly by regulatory statutes. (*Child Labor Cases, Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20 (1922)); *Hill* v. *Wallace*, 259, U. S. 44 (1922); *Trusler* v. *Crooks*, 269 U. S. 475 (1926)). A tax upon a bill of lading is a tax upon the article it represents. (*Almy* v. *California*, 65 U. S. (24 How.) 169 (1861)).

The decision of the lower court (Parker, J.,) meets the issue full face, and notwithstanding the settled law in Maryland that there is no transfer, states in the following language at p. 726 that there is a transfer at death:—

> "If the parties should be divorced the estate would be dissolved and neither would succeed to the whole property even if he should survive. Upon the death of one of the parties, however, all of his rights in the property are by operation of law transferred to the other so as to create a sole and unconditional estate therein. To *deny that there is a transfer of property in such case resulting from death is to lose the substance of legal rights while grasping at the shadow.*" (Italics ours.)

The reasoning of the Court below has plausibility but it necessarily carries with it its own refutation, because if the decedent had all of the things to which the Court

refers the survivor likewise had the same things, and the decedent had no right or property interest larger than that of the survivor. The lower Court's argument ignores completely the rights of the survivor and assumes all of the property belongs exclusively to the decedent, and that all of the property rights are transferred by the decedent. An analysis of the Court's argument is an answer to the Court's conclusion. *A fortiori,* if the Court's reasoning be correct, it carries inevitably the conclusion that the property right transferred at death was a right having a lesser value than the whole. Whether that value be one-half or less or more it nevertheless was not the whole. Yet the Court permits the whole value of the whole property held by the entirety to be included as a part of the gross estate, and the tax imposed thereon to be exacted from not the owner of that property, but from the estate *per se* of the decedent. This is tantamount to saying that "A" may be required to pay a tax based upon the value of "B's" property; or that "A" may be required to pay a tax because "B" is the owner of property (*Knowlton* v. *Moore,* supra, p. 76).

We submit with full deference that the Court below in viewing the elements and incidence that go to make up and constitute an estate by the entirety has viewed with an eye full to only one element or one interest and has blinded itself to the significance of the elements and interests of property necessarily inhering in the co-tenant.

The issue between the Circuit Court of Appeals and the District Court is sharp and direct. The District Court, familiar with the settled law in Maryland, definitely held that upon the death of a co-tenant by the entirety nothing of property was transferred. The Circuit Court of Appeals, ignoring the rule of law obtaining in the State of Maryland, by judicial fiat says there was a transfer by reason of and at the death of one of the co-tenants by the entirety. If there was in fact a transfer

there is a taxable occasion. If there is a taxable occasion the tax may be measured only by the value of the property transferred. If the whole of the property was not transferred at death the tax is invalid in so far as it is applied to the whole. If the transfer did not occur at death but occurred prior thereto, then a death duty is not imposable because, as Chief Justice White said in *Knowlton* v. *Moore,* supra (p. 56) the generating source from which the taxing power takes its being is death.

POINT III.

The statute as applied is in violation of the Fifth Amendment of the Constitution.

The tax is imposed by and, as was said by Mr. Justice Stone in *Reinecke* v. *Northern Trust Company,* supra, the only imposing section is, Section 201. This section imposes a tax "upon the transfer of the net estate of every decedent dying after the passage of" the Act. The tax is collectible from the executor or administrator of the estate or from the property of the decedent (Sections 207 and 208). To bring within the effective ambit of Section 201 "the miscellaneous items of property required by Section 202 to be brought into the gross estate for computing the tax" there must be a transfer of the property described in the particular miscellaneous item at or by the death of the decedent. To say that there is a taxable occasion upon the death of one tenant by the entirety is merely to beg the question. Under the settled law of property in Maryland there is not a transfer. The Circuit Court of Appeals below disregarding the law in Maryland has held there is a transfer. The Court arrives at this conclusion not by resort to the law of Maryland, nor by a technical consideration of the law applying to es-

tates by the entirety, but upon what is announced as practical grounds that the "surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other." An heir, of course, has no enjoyment or use of property until the death of the owner. This simply is not true in the case of an estate by the entirety for there the surviving tenant has had prior to death all of the uses and enjoyment as much so as the decedent. The Court says at p. 726:—

> "We think, however, that this gives too narrow a meaning to 'transfer' and ascribes too much importance to what are pure fictions of the law. It is true that husband and wife are said to be seized of the estate by entireties '*per tout et non per my*', that is to say, each during their joint lives is deemed seized of the whole estate and not of the moiety thereof; and it is true that, upon the death of one, the survivor is said to take no new interest because originally vested with the entirety. But these doctrines are pure fictions based upon the fiction of the unity of husband and wife. *Marburg* v. *Cole*, 49 Md. 402, 33 Am. Rep. 266; *Ades* v. *Caplan*, 132 Md. 66, 103 A. 94, L. R. A. 1918D, 276. As a matter of fact, husband and wife are not one person but two persons, and neither has absolute right in or control over the property so long as the other lives. Only upon the death of one does the other acquire absolute ownership with the right to sole and unrestricted use and possession and the right to alien and convey. Whatever form of technical expression be used, therefore, and whatever sophistries indulged, the fact remains that, upon the death of one of the parties, the survivor by operation of law *succeeds to the interest which* the decedent had in the property." (Italics ours).

But does the survivor, either in fact or in law, *succeed* to the "interest which the decedent had in the property"? The survivor already had the whole, subject only to an adverse veto power as to disposition.

Is not the correct interpretation of what happens that the interest of the decedent is extinguished—obliterated—without the transfer of anything?

The property involved in suit was conveyed in 1917 by the decedent to himself and wife as tenants by the entirety. He died in 1918. There was a transfer in 1917 prior to his death to his wife as much as there was a transfer to himself or a reservation to himself. When the Court undertakes to ignore and disregard the technicalities of an estate by the entirety, and the fiction of the unity of husband and wife, in order to arrive at the conclusion that upon the death of the husband the property is transferred, the Court by the same token and reasoning ignores and disregards while invoking the fiction of the unity of husband and wife the interests of the wife in the transfer to her in 1917.

If the husband could not have disposed of, sold, aliened or conveyed the property during the joint lives of the spouses, the transfer in 1917 was irrevocable as to him. If it were necessary for him to obtain the consent to the subsequent transfer or other disposition of the property transferred, of "one entitled to the beneficial, and consequently adverse, interest, * * *" the transfer "for all practical purposes had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." (*Reinecke* v. *Northern Trust Company*, supra, (p. 346)).

The absence of the power of disposition or of control in respect of disposition renders inapplicable the decision in *Chase National Bank* v. *United States*, supra. There "the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he himself were the beneficiary of them." This is not so in the case in suit.

The Court below in applying the Chase National Bank decision stated that (p. 726)

> "The contention was made there, as here, that the interest of the beneficiary had vested prior to the death of an insured, and that consequently there was no transfer to be taxed, but the Court held that the policies should be included."

There is a patent and obvious distinction between the vesting of the property in a tenant by the entirety which is subject to no power of revocation nor of disposition, and the vesting of a life insurance policy by a transfer, where there is a reservation of the right to change the beneficiary. In the one case the right of each tenant by the entirety is irrevocably vested subject only to a condition subsequent which is not under the control or power of the decedent, and in the other the beneficiary of the policy has no irrevocable and indefeasible rights until the death of the insured as against the decedent. In the one case the grantor has no power of disposition, in the other such a power remains until death. At the moment of death the insured could in the latter case have changed the beneficiary or wholly have disposed of the property. As this Court said in the *Chase National Bank* case, supra:—

> "The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled."

In answering the question thus presented the Court said (p. 338):—

> "*Termination of the power of control* at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax." (Italics ours.)

The distinction between the *Chase* case and the case in suit is definite and wide.

In the case in suit the exercise or non-exercise of a power of disposition was impotent. In the *Chase* case it was of the essence. No economic benefit shifted upon the death of the tenant by the entirety, because from the original creation of the tenancy the survivor had the full and undisputed enjoyment of all the usufruct and elements of property, and by death had no more than she had before, except that there was an end of a veto power upon the disposition of the property. The power of disposition or control in respect of disposition in the decedent was restricted and limited by the necessity of the consent of the co-tenant by the entirety. This being so, the transfer of the property itself, the value of which is the subject of the tax, was beyond the power of the decedent to control. (See *Reinecke* v. *Northern Trust Company,* supra; *The Farmers' Loan and Trust Company, as Trustee of Astor trust* v. *Bowers,* 29 Fed. [2d] 14).

If it be true, and under the settled law of Maryland it is true, that upon death there is no transfer of the whole of the property, then the question resolves itself into whether the original transfer in 1917 may be in 1918 subjected to a tax because that transfer was of the class described in "the miscellaneous items" included in Sec-

tion 202 of the statute. The Government argues that this may be done because such a transfer is testamentary in character and is thus reasonably related to the thing taxed, and that it is necessary to set up this artificial entity as the measure of the tax, and include therein designated classes of property, in order that certain dispositions of property made by decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, may be reached. The Government with bold consistency contends that the inclusion of estates by the entirety in the taxable net estate is necessary to prevent tax avoidance and that the tax may be sustained as a necessary adjunct to the taxation of testamentary transfers, "even if standing alone its constitutionality might have been subject to doubt." (See brief, pp. 546-547).

Does not the Government argue too much? "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax. * * * *Reinecke* v. *Northern Trust Co.*, supra, (p. 347)". If the property has been transferred prior to death it may be considered as testamentary in character, only if in fact it is testamentary, that is to say, there is a shifting of the economic benefits, *and of those economic benefits that are the subject of this tax.*

The United States Circuit Court of Appeals for the Second Circuit in *Frew* v. *Bowers*, 12 Fed. [2d] 625, (and in which case the Government confessed error after the decision of *Nichols* v. *Coolidge*, 274 U. S. 531) held that a transfer made prior to the enactment of the Revenue Act of 1918 upon which transfer there was a reservation of the income during the life of the grantor was not subject to the Federal estate tax. This was held to be so notwithstanding that the full beneficial enjoyment of the property passed at the date of the death of the decedent. Now if the incidence of the tax is upon the transfer of the beneficial enjoyment, no question of retroactivity of the

statute was involved in that case. (See also *Reed* v. *Howbert*, 8 Fed. (2d) 641 and *Cleveland Trust Company* v. *Routzhan*, 22 Fed. (2nd) 1009). The same situation presented in these cases was presented to this Court in *Reinecke* v. *Northern Trust Company*, with the exception that in addition to the reservation of the income or usufruct there was also a reservation of a power to revoke. When this power of control and disposition was reserved to the transferror this Court held the tax was properly imposed. The necessary conclusion from the different results of the different cases is that the basis of the holding in the *Reinecke* decision was upon the ground that there was up to the moment of death a power of control, and of disposition of the principal of the transfer, which is the taxable commodity.

In the concurring opinion of Learned Hand, Circuit Judge, in *Frew* v. *Bowers*, he says, at p. 630:—

> "And so I am not prepared to say, if section 402(c) had merely included in Mr. Nash's estate the property which he conveyed to the trustees in 1910, at the value it *then* had, that it would not have been valid." [Subsequently this Court in *Nichols* v. *Coolidge*, supra, and again in *Untermeyer* v. *Anderson*, 276 U. S. 440, held that such a tax would have been invalid]. "But it does not do that. In substance it imposes a tax upon the settlor, measured by the value of property *at his death*, over *which he has parted with all control*, perhaps, as here, long since. As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fiftyfold and the tax leave the settlor destitute when he dies. * * * Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the

subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. *Such a law is far more capricious than merely retroactive taxes.* Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice.

But it is answered that this result goes only to the equal assessment of the tax and must rest upon the Fifth Amendment, which does not apply to federal taxation. I quite agree that the Supreme Court has in many cases implied or said as much. * * * If the rule is to be taken unconditionally, taxpayers may be selected by lot and assessments may vary with the price of wheat. Perhaps it would have been necessary to go so far, had it not been for the opinions in *Brushaber* v. *U. S.*, supra, 24, 25 (36 S. Ct. 236), and *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450, 45 S. Ct. 135, 348, 69 L. Ed. 703, and the strong intimations in Lewellyn *v.* Frick, 268 U. S. 238, 251, 252, 45 S. Ct. 487, 69 L. Ed. 934. But these make it clear that the power is not utterly absolute. A tax may be so 'arbitrary and capricious.' its 'inequality' so 'gross and patent,' that it will not stand, and as I can think of no other pertinent constitutional limitation, but the Fifth Amendment, it seems to me that the rule is not as stark as the defendant argues. If there be any limit whatever, I own I cannot, except in fancy, think of a case more plainly beyond it than this." (Italics ours).

In so far as the statute imposes the tax upon the value of property that is transferred at or by reason of death its propriety is unassailable. But the effect and force of the statute becomes vicious when it attempts to impose a tax upon property irrevocably transferred long prior to the death of the decedent, or undertakes to impose a tax upon the estate and to employ, as a measure of that tax, the value of property belonging to another or already beyond the power of the decedent to transfer. This

is in part the basis of the decision of this Court in *Nichols* v. *Coolidge*, supra, for this Court said on February 24th of this year in *Cooper* v. *United States*, 74 L. Ed. 314, 315, in speaking of the *Coolidge* decision that

> "*Nichols* v. *Coolidge*, supra, held arbitrary and capricious a statute which required executors to pay an excise ostensibly laid upon the transfer of property by death, but *reckoned upon its value plus the value of other property conveyed by the decedent before the enactment in entire good faith* and without *contemplation of death*, and said that to enforce it would amount to confiscation." (Italics ours).

It is difficult to conceive of a more capricious or arbitrary tax than one upon the value of property transferred *per tout et non per my* prior to death at the value of that property at the death of one of the co-tenants and the executor of the estate of the decedent required to pay that tax which is reckoned upon the value of the property of the decedent plus the property with which the executor has no concern, may never administer, and which is not subject to the debts or obligations of the decedent, and which is wholly beyond his power of control or disposition. But the Government contends this is necessary to prevent avoidance of taxes, even though "standing alone its constitutionality may have been subject to "doubt." "Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity". *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240.

If a tax attempted to be imposed upon the death of one of the tenants by the entirety as though upon a transfer when the settled law of the state is that there is no transfer, may be, as the Government admits, of doubtful constitutionality, provided it is not a part of the Federal estate tax, and this property is sought to be used as a measure for the tax upon something else, "it would open the way for easily doing indirectly what is forbidden to be done di-

rectly and would render important constitutional limitations of no avail." *Frick* v. *Pennsylvania*, 268 U. S. 473, 495.

This Court has repeatedly held that the Congress may not do indirectly what it may not do directly, and that it is a violation of due process of law as guaranteed by the Constitution of the United States if the thing that may not be taxed is indirectly brought into the penumbra of things that may be taxed. For as this Court said in *Frick* v. *Pennsylvania*, (p. 494):—

> "Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax and which necessarily operated to make the amount of the tax just what it would have been if the state's power had included what was excluded by the Constitution. This ground, in our opinion, is not tenable."

Of course the Congress may impose a tax upon an estate by the entirety, or upon the occasion of the death of one of the tenants by the entirety, or upon both tenants by the entirety, but such a tax must be apportioned in accordance with the provisions of the Constitution of the United States for direct taxes. If the tax be unapportioned then it must fall upon some excisable occasion, and must fasten upon the property the subject of the excise. If the property in suit sought to be taxed is not in fact or in law a part of the estate of this decedent (and it is not) then the imposition is a taking of the property of the estate without due process of law and a taking of the property of the legatees and devisees under the Will of this decedent for public uses without just compensation both in violation of the Fifth Amendment of the Constitution of the United States. If the death of the decedent occasions a transfer then obviously an excise may properly be imposed. But this excise may be measured only by the value of the property that is transferred. If

this value be the whole of the property, the contention of the Government is correct. If it be less than the whole then the statute is unconstitutional. If there be no transfer as of the moment of death and the tax is construed to be upon the transfer prior thereto, then to measure the tax by the value of the property as of the date of death, and of that value superimposed upon the value of property belonging to the decedent, the imposition is too whimsical to stand. Such a tax is not taxation at all but confiscation. "Arbitrary selection, it has been held, cannot be justified by calling it classification" (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417).

In *May* v. *Heiner*, decided by this court on April 14, 1930, it was held that a transfer made in 1917 by a person who died in 1920, which transfer was upon trust to pay the income therefrom to her husband during his life, and after his decease to the grantor during her life, and upon her death the remainder or corpus to her four children, etc., was not subject to the Federal estate tax. This court said in respect of the facts:

> "The record fails clearly to disclose whether or not Mrs. May survived her husband. Apparently she did not. *But this is not of special importance since the refund should have been allowed in either event.*" (Italics ours.)

And again:

> "It was not testamentary in character and was beyond recall by the decedent. *At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.*" (Italics ours.)

So, too, is such interest as the decedent-tenant in suit had prior to death "obliterated" by death, and nothing of property interest "passed from him to the living".

The argument of the Government that such estates should be taxed, though not otherwise constitutionally subject to an excise, in order to prevent avoidance of the Federal estate tax is one of ingenuity rather than logic. But could such estates be availed of in any practical sense or appreciable extent to that end? To assume so tests credulity. But the statute does more. It taxes the whole of the estate by the entirety even though it was not created by either of the tenants, but was acquired by gift, devise or bequest. And the later statutes tax the half of such estates even though received by gift, bequest or devise from another. Both the framework of the statute and a normal recognition of the probabilities negative the reason and deny the hypothesis.

POINT IV.

The decision of the United States Circuit Court of Appeals for the Fourth Circuit, should be reversed.

Respectfully Submitted,

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 546

THE UNITED STATES OF AMERICA, PETITIONER

vs.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA AND CHARLES SINKLER, ADMINISTRATORS, ETC.

No. 547

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, EXECUTORS, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1929
CERTIORARI GRANTED JANUARY 20, 1930

(34677)
(34678)

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1-2 In United States District Court for the Eastern District of Pennsylvania

No. 13444. September term, 1927

UNITED STATES OF AMERICA v. PROVIDENT TRUST COMPANY OF PENNSYLVANIA and Charles Sinkler, administrators c. t. a. of estate of James K. Young, deceased	George W. Coles, Esq. John S. Sinclair, Esq.

Docket entries

Nov.	10, 1927.	Præcipe to issue Summons filed.
"	10, "	Summons exit—returnable 1st Monday in December, 1927.
"	10, "	Statement of claim, filed.
"	29, "	Summons returned: Service accepted as to Provident Trust Co., of Penna., and—served on November 22, as to Charles Sinkler, admx. c. t. a., and filed.
Dec.	9, "	Affidavit of defense raising questions of law filed.
"	21, "	Præcipe to place case on argument list filed.
July	17, 1928.	Argued sur demurrer.
Sept.	10, 1928.	Opinion, Kirkpatrick, J. sustaining affidavit of defense and granting leave to enter judgment in favor of defendants filed.
Oct.	5, "	Præcipe to enter judgment filed.
"	5, "	Judgment upon statutory demurrer in favor of defendants filed.
Nov.	23, "	Assignments of error filed.
"	23, "	Petition for appeal and order of court granting prayer of petition filed.
"	23, "	Præcipe for transcript of record sur appeal filed.
"	26, "	Citation allowed and issued.
"	26, "	Copy of notice of appeal filed.
Dec.	3, "	Citation returned—service accepted and filed.

3 In United States District Court

Statement of claim

Filed November 10, 1927

The United States of America, plaintiff, by George W. Coles, United States Attorney for the Eastern District of Pennsylvania, claims of the defendants the sum of $1,244.43 upon a cause of action, of which the following is a statement:

1. That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

2. That the Provident Trust Company, of Philadelphia, is a corporation organized under and existing by virtue of law of the State of Pennsylvania, with its principal office at 401 Chestnut Street, Philadelphia, Pennsylvania, and that Charles Sinkler is a citizen and resident of the State of Pennsylvania residing at 1601 Walnut Street, Philadelphia, Pennsylvania.

3. That this is an action at law arising under an act of Congress providing for internal revenue, brought to recover taxes due from the defendants.

4 4. That on or about August 28, 1923, James K. Young, being then a resident of Philadelphia, Pennsylvania, died testate, seized, and possessed of real and personal property, tangible and intangible, and left surviving as the sole beneficiary, his wife, Mary Wilson Young.

5. That said Mary Wilson Young, sole beneficiary under decedent's will and the executrix named therein, did on or about the 7th day of September, 1923, renounce her right to act as executrix, and requested the appointment of the defendants as administrators c. t. a., and that on or about the 12th day of September, 1923, the will of said decedent was admitted to probate and letters of administration c. t. a. were granted the defendants, and that at all times hereinafter mentioned the defendants were and now are the duly qualified, lawfully appointed and acting administrators c. t. a. of the estate of James K. Young.

6. That on or about August 26, 1924, the defendants, pursuant to the provisions of the revenue act approved November 23, 1921 (42 Stat. 323), filed with the United States collector of internal revenue for the First District of Pennsylvania, a return, Form 706, for Federal estate taxes, in and on behalf of the estate of James K. Young, deceased, which return disclosed the following:

Gross estate:	
Real estate	$6,500.00
Stocks and bonds	4,069.19
Mortgages, notes, etc	9,261.42
Jointly owned and other miscellaneous property	3,836.70
Total gross estate	$23,667.31
5 Deductions:	
Funeral expenses	$497.50
Administration expenses:	
Executor's fee	858.22
Attorney's fee	500.00
Miscellaneous	128.00
Debts of decendent	2,271.16
Specific exemption (resident, decedents only)	50,000.00
Total deductions	$54,254.88
Total gross estate	$23,667.31
Total deductions	$54,254.88

7. That by deeds dated May 8, 1912, July 24, 1901, and September 16, 1903, there were conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety, the premises known as

#220-222-224 South Sixteenth Street, Philadelphia, Pennsylvania. On June 19, 1923, decedent and his wife conveyed these premises to George W. Eyre for a consideration of $160,000.00, of which $60,000.00 was paid in cash and $100,000.00 taken back by decedent and his wife as ground rent, to yield an annual income of $6,000.00, with the stipulation, however, that the ground rent might be extinguished on or before December 19, 1928. That title to said ground rent vested in the decedent and his wife as tenants by the entirety.

8. That by deed dated June 23, 1923, there was conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety the premises known as #244 South Twenty-first Street, Philadelphia, Pennsylvania.

9. That no part of the consideration for the above properties was furnished by the wife of the decedent.

6 10. That thereafter, on or about April 22, 1925, the Commissioner of Internal Revenue, upon review and audit of the said return and upon information obtained by him determined that under the provisions of the revenue act of 1921 the value of the ground rent and accrued interest thereon, and real estate, above described, should have been included in the gross estate, and that there was a deficiency in estate tax in the case of the estate of James K. Young in the amount of $1,244.43, and gave notice thereof on or about April 22, 1925. The commissioner determined the gross estate, deductions, net estate, and the amount of tax as follows:

Gross estate:	
Real estate	$6,500.00
Stocks and bonds	4,069.19
Mortgages, notes, etc	9,281.42
Jointly owned and other miscellaneous property	154,986.70
Total gross estate	$174,817.31
Deductions:	
Funeral expenses	$497.50
Administration expenses:	
Executor's fee	858.22
Attorney's fee	500.00
Miscellaneous	128.00
Debts of decedent	2,271.16
Unpaid mortgages	33,340.99
Specific exemptions (resident decedents only)	50,000.00
Total deductions	$87,595.87
Total gross estate	$174,817.31
Total deductions	87,595.87
Net estate	$87,221.44
Total tax	$1,244.43

1 11. That the defendants as administrators c. t. a. of the said estate, appealed to the United States Board of Tax Appeals from said notice of deficiency, said appeal being docket #4976, entitled "Appeal of Provident Trust Company of Philadelphia and Charles Sinkler, Administrators, Estate of James K. Young," and said appeal was heard by the board on February 25, 1926.

12. That the decision of the Board of Tax Appeals was rendered January 8, 1927, and is reported in Volume V of the reports of the said board at page 1004 (5 B. T. A. 1004), and that on March 2, 1927, an order of no deficiency was made and entered by the board.

13. That the commissioner does not acquiesce in the decision of the Board of Tax Appeals.

14. That the value of the ground rent, accrued interest thereon, and the real estate, described herein, was lawfully and properly included by the commissioner in the determination of the gross estate of the decedent and that there is due and unpaid from the said defendants to the plaintiff the sum of $1,244.43, together with interest thereon from August 26, 1924, to the date of judgment at the rate of 6 per cent per annum.

15. That due notice and demand has been made upon the defendants for payment of the aforesaid additional tax, but said defendants have failed and refused and still fail and refuse to pay the said sum or any part thereof.

16. That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore the plaintiff demands judgment against the de-
8 fendants in the sum of $1,244.43, together with interest thereon from August 26, 1924, to the date of judgment at 6 per cent per annum, together with costs and disbursements of this action.

GEORGE W. COLES,
United States Attorney.

Duly sworn to by George W. Coles, jurat omitted in printing

In United States District Court

Affidavit of defense raising questions of law

Filed December 9, 1927

Provident Trust Company, of Philadelphia, and Charles Sinkler, administrators c. t. a. of the estate of James K. Young, deceased, the above-named defendants, reserving their right hereafter if necessary to answer the averments of fact in the statement of claim, suggest that the statement of claim as filed by the plaintiff is insuffi-
cient in law for the following reasons:

9 1. The plaintiff's statement fails to disclose any claim against the defendants upon which a judgment can be lawfully entered against them.

2. The value of the ground rent, accrued interest thereon, and the real estate described in the statement of claim was unlawfully and improperly included in the gross estate of the decedent, and the determination of deficiency in Federal estate tax with respect thereto

by the Commissioner of Internal Revenue was improper, unlawful and without authority of law, because,

(a) The ground rent and real estate referred to in the statement of claim were held by the decedent and his wife immediately prior to the death of the decedent as tenants by the entirety;

(b) The common-law doctrine of estates by the entirety obtains in the State of Pennsylvania;

(c) Under the law of Pennsylvania there is no transfer or transmission of property interest by reason of the death of one spouse of any property or interest of that spouse in an estate by the entirety to the surviving spouse;

(d) The nature and incidents of an estate by the entirety constitute a rule of property established by many decisions of the appellate courts of Pennsylvania, and such rule of property is binding on the Federal court in considering the transfer or devolution of property under such rule;

(e) The fact that the decedent paid the full consideration out of his own funds for real estate conveyed to him and his wife as tenants by the entirety can not have the effect of constituting the husband and wife other than tenants by the entirety;

10 (f) Under the provisions of the revenue act of 1921 Federal estate tax is imposed on the transfer of the net estate of the decedent, and since under the law of Pennsylvania there was no transfer of any property or interest in property to the surviving spouse by virtue of the death of the decedent in real estate theretofore held by him and wife as tenants by the entirety, the inclusion of the value of such property held by the decedent and his wife as tenants by the entirety as part of the gross estate of the decedent was without authority in law;

(g) Even if the value of the property held by a decedent and his wife as tenants by the entirety could properly be included as part of the gross estate under the provisions of the revenue act of 1921, yet the value of the ground rent could not be properly included as part of the gross estate inasmuch as the decedent and his wife became seized of the real estate from which the ground rent issued as tenants by the entirety prior to the passage of the revenue act of 1921 and the earlier acts upon which it was based. The reason for this is because the revenue act of 1921 can have no retroactive effect;

(h) If the provisions of the revenue act of 1921 are to be construed so as to require the inclusion as part of the gross estate of the value of the property held by the decedent and his spouse as tenants by the entirety, then such provisions are unconstitutional because there is not transmission of property rights occasioned by the death of the decedent, and to the extent that Federal estate tax is assessed with respect thereto such provisions would operate to deprive the defendants and the estate of which they are administrators of their property without due process of law.

Wherefore the defendants respectfully suggest to the court
11 that the plaintiff's statement of claim does not set forth a valid cause of action and judgment should be rendered for the defendants.

JOHN S. SINCLAIR,
Attorney for Provident Trust Company of Philadelphia, and Charles Sinkler, Administrators, c. t. a. of the Estate of James K. Young, deceased.

DECEMBER 9, 1927.

IN UNITED STATES DISTRICT COURT

Opinion—Sur Statutory Demurrer

Filed September 10, 1928

This is a suit by the United States for the collection of $1,244.43, additional estate tax alleged to be due upon the estate of James K. Young, deceased, brought after an adverse decision by the Board of Tax Appeals reported at 5 B. T. A. 1004. The defendant has filed an affidavit of defense challenging the sufficiency of the statement as a matter of law, and for the purpose of this decision has admitted all the facts averred therein. These facts are as follows:

The decedent died August 28, 1923. By deeds May 8, 1912, [illegible]ly 24, 1901, and September 16, 1908, there had been conveyed to the decedent and his wife as tenants by the entirety certain real estate in Philadelphia. On June 19, 1923, the decedent and his wife conveyed this property for a consideration of $160,000, of which $60,000 was paid in cash. The balance of the consideration was represented by a ground rent reserved by the decendent and his wife, to yield an annual income of $6,000, redeemable upon the payment of $100,000 with ground rent accrued. The ground rent so reserved was held by the decedent and wife as tenants by the entirety.

12 By the deed dated June 23, 1923, there was conveyed to the decedent and his wife as tenants by the entirety certain other real estate in Philadelphia, which premises continued to be so held until the date of the decedent's death. It is conceded that the act of Congress applicable to the case is the revenue act of 1921. The question for decision is whether the value of property acquired by a decedent and his wife as tenants by the entirety and so held by them at the time of the decedent's death may be included in the decedent's gross estate under the provisions of section 402 (d) of the revenue act of 1921.

In Knowlton v. Moore, 178 U. S. 41 (1899), New York Trust Company v. Eisner, 253 U. S. (1920), and Y. M. C. A. v. Davis, 264 U. S. 47, the Supreme Court held that the estate taxes created by the various revenue acts considered in those cases were not taxes upon property but were taxes upon its transmission. While the opinion

of Chief Justice White in Knowlton v. Moore uses some language to the effect that the occasion of the tax is the transmission of the property from the dead to the living, nevertheless, if that opinion be carefully considered, it will be seen that the power of the Congress to tax the transmission of property caused or effected by death is recognized without regard to whether the property itself was ever actually a part of the estate of the person whose death was the occasion of the transfer. So far as this case is concerned the significant principle to be derived from that decision is that transmission by death and not transmission from the dead is the generating source from which the taxing power exercised takes its being. No distinction is drawn between a transmission of property from a decedent upon his death and a transmission of property to a living person upon the death of another, and so far as the power to tax is concerned none exists.

13 A general power is given by the Constitution to Congress to lay or collect taxes of every kind or nature without any restraint, except on exports. This power is subject to only two qualifications—direct taxes must be imposed by the rule of apportionment and indirect taxes by the rule of uniformity. Hilton v. U. S., 3 Dall. 174; Kelly v. Lewellyn, 274 Fed. 108. If a tax is laid upon the transmission of a property, it is not laid on the property itself (Knowlton v. Moore, supra) and is not a direct tax and need not be apportioned. In case of an estate tax it is immaterial to the question of constitutionality whether the property taxed passes from the decedent at his death or whether it merely passes or is transmitted upon the occasion of his death. Thus in a recent case decided by this court (Fidelity-Philadelphia Trust Co. v. McCaughn, not reported) it was held that Congress had the power to tax property passing under a general power of appointment exercised by will, although the property itself had never formed any part of the estate of the decedent who exercised the power. The power of Congress being granted the question in that case became one of the intention to exercise it as evidence by the terms of the act.

It is, however, necessary that there be some transmission or transfer of property effected by the death of some person. If no such transmission has occurred, then there is no privilege or right toward which the taxing power could have been directed and the tax can fall nowhere except directly on the property in question and will therefore be a direct tax and unconstitutional. Where there is a real transmission of property arising by reason of death, a tax may be properly levied upon it. Where there is no such transmission, an attempted exercise of the taxing power is unconstitutional.

In this case we may concede for the purpose of this decision
14 the intention to tax, upon the death of either spouse, property held by the husband and wife as tenants by the entirety, but the question remains, Has the death of the husband occasioned a "transmission" of anything to the wife. The answer depends upon

the character of the interests which exist under an estate by the entirety as defined by the law of Pennsylvania. The Supreme Court of Pennsylvania had occasion to consider this point in Biehl v. Martin, 236 Pa. 519. In the course of that opinion, the court said:

"This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife. It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one, while the right of survisorship remains to the other, that other takes no new title or estate."

It will thus be seen that the death of the husband does not effect the transmission of any property. The quantum and nature of the estate or interest of the wife in the property is exactly the same after the husband's death as it was before. As the court pointed out, the husband's connection with the estate was merely that of an "adjunct" to that of the wife and vice versa. Before the husband's death the estate was owned and possessed by a legal entity or personage, viz., husband and wife, who in certain aspects under the law constitute one person. After his death the legal personage became an individual, the natural person, the wife. Nothing has passed to her which she did not have before. There has been no change in her interest. Her own status under the law has changed, but not the nature of her property.

The foregoing case as well as O'Malley v. O'Malley, 272 Pa. 528, Meyers Estate, 232 Pa. 89, and Blaise v. Anderson, 241 Pa. 98, all show that the Pennsylvania legislation affecting the property rights of married women has not in any way changed the nature of tenancy by the entirety in this State. These cases are effective answers to the suggestion that this estate had its rise in a legal fiction now to a large extent discarded and the conclusion is therefore reached that so far as the revenue act of 1921, section 402 (d), intends to include for taxing purposes, in the gross estate of the decedent, property held by him and his wife as tenants by the entirety, it is beyond the constitutional power of the Congress.

The affidavit of defense is sustained, the statement of claims adjudged insufficient, and judgment may be entered for the defendant.

By the court.

W. H. KIRKPATRICK, *J.*

In United States District Court

Præcipe for judgment

Filed October 5, 1928

To the CLERK:

Enter judgment in the above matter in favor of the defendants upon statutory demurrer in accordance with the opinion rendered by the Court.

(Sgd.) JOHN S. SINCLAIR,
Attorney for Defendant.

16 In United States District Court

Judgment

Filed October 5, 1928

Before KIRKPATRICK, *J.:*

And now, October 4, 1928, in accordance with the opinion of the court and by præcipe filed, judgment upon statutory demurrer is hereby entered in favor of defendants and against the plaintiff.

By the court.

Attest:

E. G. JOHNSON,
Deputy Clerk.

In United States District Court

Assignments of error

Filed November 23, 1928

And now, to wit, the twenty-third day of November, 1928, comes the United States of America, plaintiff, and by its attorney, George W. Coles, United States attorney in and for the Eastern District of Pennsylvania, makes and files this its assignments of error:

1. The District Court of the United States for the Eastern District of Pennsylvania erred in sustaining the affidavit of defense raising questions of law.

2. The District Court of the United States for the Eastern District of Pennsylvania erred in entering judgment for the defendants, and

3. In refusing to enter judgment for the plaintiff.

GEORGE W. COLES,
U. S. Attorney.

17 In United States District Court

Petition for appeal

The above-named plaintiff, United States of America, conceiving itself aggrieved by the judgment entered on October 7, 1928, in the above-entitled proceeding, doth hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, and it prays that this, its appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

GEORGE W. COLES,
Attorney for Plaintiff and Appellant.

In United States District Court

Order allowing appeal

Before KIRKPATRICK, *J.*:

Prayer of the foregoing petition for appeal is hereby granted.

By the court.

Attest:

GEORGE BRODBECK, *Clerk.*

18 In United States District Court

Præcipe for transcript of record

Filed November 23, 1928

To the CLERK OF THE COURT:

Prepare transcript of record in the above-entitled case for filing in appeal to the Circuit Court of Appeals and include the following:

Docket entries.

Statement of claim.

Affidavit of defense raising questions of law.

Opinion, Kirkpatrick, *J.*, sustaining affidavit of defense raising questions of law and permitting judgment to be entered in favor of the defendants.

Judgment in favor of the defendants.

Assignments of error.

Petition for writ of error.

Order allowing writ of error.

Præcipe for transcript of record.

Clerk's certificate.

GEORGE W. COLES,
United States Attorney.

19 [Clerk's certificate to foregoing transcript omitted in printing.]

20 [Minute entry of argument and submission, Mar. 14, 1929, omitted in printing.]

21 In United States Circuit Court of Appeals for the Third Circuit

No. 4009. March term, 1929

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA, AND CHARLES SINKLER, Administrators C. T. A. of Estate of James K. Young, deceased, appellees

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed October 4, 1929

Before BUFFINGTON, WOOLLEY, and DAVIS, *Circuit Judges*

WOOLLEY, *Circuit Judge:*

James K. Young and Mary Wilson Young, his wife, acquired as tenants by the entirety several parcels of real estate in Philadelphia. Later they conveyed some of them for a consideration part paid and the balance secured by a ground rent, reserved to themselves as tenants by the entirety, to yield them a certain annual income, redeemable at a named figure.

James K. Young died in 1923. The Commissioner of In-
22 ternal Revenue, upon review and audit of the estate tax return made by his administrators, included in the decedent's gross estate the value of the ground rent and other property, so held, and determined a deficiency in the sum of $1,244.43. From this action Young's administrators appealed and the Board of Tax Appeals entered judgment against the commissioner. 5 B. T. A. 1004. The United States then brought this suit in the District Court against Young's administrators to collect the additional tax so determined. The court, on facts averred in the statement of claim and admitted by the affidavit of defense, raising a question of law as though on demurrer, held that the Congress, by including for taxing purposes in the gross estate of a decedent property held by him and his wife as tenants by the entirety exceeded its constitutional power and entered judgment for the defendants. The case is here on the Governme s appeal.

The tax was assessed under the revenue act of 1921. That act, by section 401, imposes a tax "upon the transfer of the net estate of every decedent dying after" its passage. Section 400 defines "net estate" to mean "the estate as determined under the provisions of section 403." This section provides that the "net estate shall be determined by deducting from gross estate" certain items with which we are not concerned. To obtain a net estate there must, of course, first be a gross estate. So section 402 provides that the gross estate of a decedent shall include the value at the time of his death of all

property, real and personal, "to the extent of the interest therein held jointly, or as tenants in the entirety, by the decedent and any other person."

In a word, the Congress provided that the value of property held at the time of death by a decedent and his spouse as tenants by the entirety shall be included in the deceased tenant's gross estate, and imposed a tax upon the transfer of the resultant net es-
23 tate. The single question in this case is whether or not the Congress had power to draw such an estate within its reach and impose an estate tax upon it.

The effective words of the quoted provisions of the revenue act are "transfer" and "net estate." The Congress in these provisions and in like provisions in other revenue acts has been careful to impose the tax not upon property but upon the "transfer" of an interest in property, and the courts in construing the provisions have said, again and again, that the tax is not upon property but upon the privilege of transferring it. Thus the acts avoid imposing a direct tax, which to be valid must be apportioned. Section 2, clause 3, and section 9, clause 4, of Article I of the Constitution. Hilton v. United States, 3 Dall. 174.

But the meaning of the word "transfer" as interpreted by the courts is not so literal as at first it would seem to be. Therefore, in order to determine whether the interest of a deceased tenant by the entirety constitutes an "interest" in his property which from its nature can be included in his gross estate, and whether on his death there is a transfer of such an interest to his cotenant which is taxable as a part of his net estate, we shall look into the meaning of a "transfer" as the subject of taxation.

The earliest pronouncement upon the subject was made in Knowlton v. Moore, 178 U. S. 41, which was a full recognition that the transmission of some interest in property occasioned by death is the basis for the imposition of an estate tax as distinguished from a direct tax on property.

Reviewing the field of death duties and bringing the act then under review within its boundary, the Supreme Court stated that:

"Tax laws of this nature in all countries rest in their es-
24 sence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

Knowlton v. Moore has been cited in practically every case in which Federal estate tax acts have been involved and we know of no instance in which the court's declaration of the principles upon which such acts are based has been departed from.

The tax has ever been treated as a duty or excise because of the particular occasion which gives rise to its levy. New York Trust Co. v. Eisner, 256 U. S. 345; Y. M. C. A. v. Davis, 264 U. S. 47. The subject of the tax—the event upon which the tax is predicated—is the transmission of some interest in property occasioned by death; hence

the classification of estate taxes as death duties. If no interest is transmitted, or if no transfer takes place by the event of death, the subject of the tax is absent, and accordingly no estate tax can be validly imposed. While steadfastly adhering to the principle that death is the generating source from which the taxing power takes its being, the Supreme Court has recognized transfers subject to the tax that had been made otherwise than by death yet made finally effective at death, such as transfers made before death yet in contemplation of death, transfers in trust made before death with power reserved by the settler to revoke them, Reinecke v. Trust Company, 278 U. S. 339; transfers of insurance policies with power reserved by the insured to change the beneficiaries, Chase National Bank v. United States, 278 U. S. 327; and transfers of property with a reserved power of appointment, Saltonstall v. Saltonstall, 276 U. S. 260.

In all these cases the transfers had not been completely ef-
25 fected or the privilege of succession or the right of possession or enjoyment fully exercised before death. But in all death terminated reserved powers of control and effected final transfers to the advantage of those who had obtained the properties subject to the powers. Thus there was brought about at death, or by death, a "shifting of the economic benefits and burdens of property which is the real subject of the tax." Saltonstall v. Saltonstall, supra.

A pertinent distinction is that the tax is not upon the interest to which another succeeds on death but is an excise upon the transfer of the estate of the owner upon his death, to be reckoned upon the value of the interest transferred. Y. M. C. A. v. Davis, 264 U. S. 47, 50; Edwards v. Slocomb, 264 U. S. 61. Nor is the tax limited to a transfer of property directly from the decedent to the transferee, but extends at least to a transfer of property which, though not the decedent's was produced by him with the purpose, effected at his death, of having it pass to another.

Thus do the courts regard a "transfer"—the thing taxed—as it appears in the provision of the revenue act under review. Of course, if there is no transfer there is no valid tax. But the act imposes the tax upon something more than a transfer—namely, "upon the transfer of the net estate" of a decedent. So, also, if there is no net estate of the decedent, there is no valid tax. Thus we come to the question whether on the death of one tenant by the entirety there is any "interest" in his estate which, because of a transfer to the other tenant occasioned by his death, falls into his gross estate and later becomes taxable as a part of his net estate. The answer to this question by a Federal court depends primarily on the character of a tenancy by the entirety under the law as declared by the courts of the State in which it exists, for a construction or definition of
26 the estate by the courts of the State constitutes a rule of property which is binding upon Federal courts in considering its devolution or transfer. DeVaughn v. Hutchinson, 165 U. S. 566, 570; Clarke v. Clarke, 178 U. S. 186; Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 464.

A tenancy by the entirety in Pennsylvania retains in their purity all the characteristics of its English origin. A quotation from one of many decision by its courts, always in harmony, will disclose the rule of property which Pennsylvania has laid down in respect to an estate of this character.

In Biehl v. Martin, 236 Pa. 519, 522, decided as recently as 1912, the Supreme Court said:

"This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject.

"Fundamentally the estate rests on the legal unity of husband and wife; it is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one while the rights of survivorship remain to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unity made up of divisible parts; that of a husband and wife is also a unity, but is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased
27 cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individual identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.'" Stuckey v. Keefe, 26 Pa. 397.

Federal courts in the Third Circuit have from time to time recognized the authority of the aforegoing case. Getty v. A. Hupfel's Sons, 292 Fed. 178; 299 Fed. 939. (1923, 1924.)

The courts of Pennsylvania are entirely consistent in carrying into effect, even in matters of taxation, the rule of property thus declared. The transfer inheritance tax statute of Pennsylvania provides a succession tax. In a case where an attempt had been made to tax a tenancy by the entirety it was contended (as it is contended in the case at bar) that the transfer did not take effect in possession and enjoyment until after the death of one of the tenants and that it was then that the possession and enjoyment passed to and became effective in the surviving spouse. The court held that, as the right

of possession and enjoyment arose at once in favor of both grantees, the survivor received nothing by virtue of the death of her husband which might be the subject of the tax. Estate of Henry G. Fink, 6 Erie County Law Journal, 281 (1922).

This Federal court is thus confronted by a rule of property, in respect to "descent, alienation, and transfer," definitely established by the law of the State in which the land is situated. DeVaughn v. Hutchinson, 165 U. S. 566, 570. If only we could ignore what
28 some term the "technical characteristics" of a tenancy by the entirety (which Pennsylvania, however, has declared to be its basic characteristics), regard the legal unity of husband and wife as "pure fiction," and look upon the estate as a "practical matter," the problem would be easy to solve. But we must face the problem precisely as the Commonwealth of Pennsylvania and the Congress have presented it. That it is a problem the Government recognizes by its concessions in its brief that "In the case at bar . . . neither the title nor the estate nor the interest of the survivor was created by the death of the decedent"; and that "Congress has undertaken, in spite of the well-established rule that there is no transfer of title or of interest or of estate from one tenant by the entireties to another upon death," to impose a tax upon estates of this class. The Government, however, meets this legal difficulty by stating (what is true) that in this case on the death of one tenant "there was a change in the incidents of the survivor's estate," and that Congress provided "that the change in the relation of the wife to the property shall be considered a transfer affording a proper subject matter to be taxed."

By these concessions the Government rather begs the question, or very nearly admits the question out of the case, for the question concerns the power of the Congress to do what it did, namely, to tax as a transfer an interest in an estate of this kind on death when in an estate of this kind there is no transfer on death. If there be no transfer the Congress, "under the mere guise of reaching something within its powers, . . . may not lay a charge upon what is beyond them." Nichols v. Coolidge, 274 U. S. 531, 541.

The Government, by basing its case upon a "change" in the rela-
29 tion of the two tenants, occasioned by the death of one, as the subject matter to be taxed, manifestly can succeed only if that change amounts in law to a transfer. On the theory of taxable change an argument may be made something like this:

On the instant of the husband's death in this case the estate by the entirety ended; then the wife acquired another estate—an unfettered fee—of which she became the sole owner. The instant he died the wife had something she did not have before. True, in the theory of a tendency by the entirety, she had, as before, the whole estate, yet it is now shown of the incident of her husband's right of survivorship. What came to her on her husband's death necessarily passed from him. Thus his death generated not merely a change

of owner but a change of estate. He being first to die, that which left him was his right of survivorship, and while, of course, his right of survivorship could not as such pass to his wife, it nevertheless passed out of legal existence and thus effected a change or transfer of an interest in property which once was wholly his and which now is wholly hers. But for the husband's death, his wife, though in fiction holding the whole estate, would continue to hold actually a limited interest in the estate, yet by reason of his death the estate by the entirety ceased, a change in the estate was wrought, and her interest in the estate by reason of his death and her survivorship became unqualified and absolute. Of course this line of reasoning overlooks the legal fact that the generating source of the wife's estate, even after her husband's death, was not his death but the instrument that created the estate, and it also overlooks the significant principle declared in Knowlton v. Moore that transmission by death (not transmission from the dead) is alone the generating source from which the taxing power, here exercised, takes its being.

And thus we are back to where we were at the start. Was there a " transfer " of an interest occasioned by death? A mere change of status, though accompanied by economic benefits, does not necessarily involve a transfer of an interest in property, even if the change be brought about by death. It can hardly be said that the change effected by death of the tenant of a particular estate involves a transfer of his estate to the remainderman when, in law, the two estates were created at the same time long before, the estate of the remainderman having vested at the time of its creation. Nor does the mere ceasing or ending of an estate, distinguished from the ceasing of an estate with reserved powers not exercised, constitute a transfer or provide a subject matter for taxation for when, as in the instance of a vested remainder, the particular tenant dies, all that he had ceases to be his and passes out of him, it is true, but it passes out of him by virtue of the instrument of its creation, and the economic benefits which usually and naturally enure to the remainderman (or other person succeeding) are occasioned not by his death but by that instrument. A change in an estate or a cessation of an interest in an estate whereby nothing is left in or transferred through the estate cannot create something in the " net estate " of a decedent on which to base an estate tax.

Keeping in mind that each tenant by the entirety is completely seized of the whole estate by virtue of the creative instrument, and that when one dies the other takes nothing by a new title but merely ceases to divide its enjoyment, United States v. Robertson, 183 Fed. 7, 11, we inquire, what passed out of the husband in this case when he died? Certainly his right of survivorship. What came to the wife when he died? Not a moiety or other part of the estate, because the prior holding had not been joint; and certainly not the whole of the estate, for that she already had acquired and continued to hold

under the instrument which created the estate. What was the
31 result of the husband's death upon her? She got rid of him and his right of survivorship and of any obligation on her part to divide the enjoyment of the property with him. The interest of both being per tout et non per my—that is, where neither is a tenant of a moiety but each is a tenant of the whole, when the husband died his tenancy simply ended and the wife's simply continued precisely as it was arranged by the original instrument. When, as here, the husband died, the wife received nothing from him. She already had all there was to be had—the whole estate. Therefore on his death nothing was transferred from him to her. He stopped and she went on, and still goes on, just as she began without wating upon, or being dependent upon, any transfer of his interest in the property theretofore held by them as tenants by the entirety—unless, indeed, the "change" which followed the husband's death resulted in a shifting of the economic benefits and burdens of property, including thereafter her sole right to alien, encumber and devise, and unless this shifting of benefits and burdens amounted in itself to a "transfer" to her of an "interest" which belonged to her husband and which on his death fell into his gross estate and thereafter became a part of his net estate subject to tax within the latitude which the decisions have given to that expression. Unless we ignore the peculiar yet essential characteristics of a tenancy by the entirety which grew up in the common law and persisted without change through the law of Pennsylvania, we cannot find that on the death of one tenant the interest which he had in the estate when living is, by reason of his death, transferred to the tenant surviving, nor, remembering that each tenant is seized of the whole, can we find that on the death of one the value of the whole property shall be taken as the measure of the interest claimed to be transferred, as though he were
32 the sole owner, or that the tenant surviving, also holding the whole title, should have the value of her estate taken as the basis and measure of the decedent's tax.

We are constrained to hold with the learned trial judge that it was beyond the constitutional power of the Congress, exercised by section 402 (d) of the revenue act of 1921, to include in the decedent's gross estate property held by him and his wife as tenants by the entirety. Holding, therefore, that the tax assessed by the commissioner under section 401 of the act is void, the judgment of the district court is affirmed.

A true copy.
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

32 In United States Circuit Court of Appeals for the Third Circuit

No. 4000 (list No. 46). March term, 1929

UNITED STATES, APPELLANT

vs.

PROVIDENT TRUST CO. ET AL., ADMRS., J. K. YOUNG, DEC'D., appellees

Judgment filed

Oct. 4, 1929

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania,

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, October 4, 1929.

VICTOR B. WOOLLEY,
Circuit Judge.

[File indorsement omitted.]

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35-36 Before U. S. Board of Tax Appeals

Docket Number 11298

GIRARD TRUST CO., AND JOSEPH L. Woolston, executors of the will of Beulah H. J. Woolston, dec'd., petitioner	For taxpayer: J. Snowdon Rhodes, Esq.
v.	
COMMISSIONER OF INTERNAL REVENUE, respondent	For commissioner: Frank T. Horner, Esq.

Docket entries

Jan.	25, 1926.	Petition received and filed.
"	28, "	Copy of petition served on solicitor.
"	" "	Notification of receipt mailed taxpayer.
Mar.	29, "	Answer filed by solicitor.
Apr.	3, "	Copy of answer served on taxpayer. Assigned to general calendar.
June	7, "	Stipulation as to hearing filed (1).

Dec. 6, 1927. Hearing date set 1-19-28.
Jan. 19, 1928. Hearing had before Mr. Siefkin on merits—Petitioners brief filed at hearing—Respondents brief due Feb. 20, 1928.
" 21, " Transcript of hearing of 1-19-28 filed.
" 26, " Brief filed by G. C.
Feb. 29, " Decision rendered. Mr. Seifkin. Judgment will be entered on 15 days' notice, under rule 50.
Apr. 13, 1928. Notice of proposed redetermination filed by G. C.
" 17, " Notice allowing taxpayer until 5-10-28 to file alternative settlement for hearing 5-17-28, failure to do so hearing date set 5-15-28.
May 7, " Consent to settlement filed by taxpayer.
" 12, " Order of redetermination, entered.
Nov. 5, " Petition for review by U. S. Cir. Ct. of Appeals, 3rd Cir., with assignments of error filed by G. C.
" 9, " Proof of service of petition filed.
" 16, " Praecipe with service thereon filed by G. C.
[Certificate to foregoing paper omitted in printing.]

37 Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed January 25, 1926

The above-named taxpayers hereby appeal from the determination of the Commissioner of Internal Revenue, set forth in his deficiency letter (MT-ET-CL-4273-CLMcC), dated December 7, 1925, and as the basis of their appeal set forth the following:

(a) Girard Trust Company, one of the above-named executors, is a Pennsylvania corporation, having its business at the N. E. cor. of Broad and Chestnut Streets, Philadelphia, Pennsylvania. Joseph L. Woolston, the other executor, resides at 429 W. Chestnut Avenue, Chestnut Hill, Philadelphia.

(b) The deficiency letter, a copy of which is attached hereto, was mailed to the taxpayers on or about December 7, 1925.

(c) The tax in controversy is an alleged deficiency of Federal estate tax, which deficiency has not yet been assessed and approximates the sum of $2,205.32. The decedent died February 8, 1924.

38 (d) The determination of said deficiency of tax, as contained in the said deficiency letter, is based upon the following errors:

1. The Commissioner of Internal Revenue, in his letter of December 7, 1925, erred in finding that the real estate known as No. 429

W. Chestnut Avenue, Chestnut Hill, Philadelphia, Pennsylvania, is subject to taxation under section 402 (d) of the revenue act of 1921.

2. The Commissioner of Internal Revenue in his said letter erred in finding that said premises "should be included in the gross estate" of Beulah H. J. Woolston, deceased.

3. The Commissioner of Internal Revenue in his said letter erred in finding that real estate held by the decedent and her husband "as tenants by the entirety" should be deemed a part of the decedent's estate within the meaning of the revenue act of 1921.

4. The commissioner erred in finding that the deficiency tax of $2,205.32, as set forth in the bureau's tentative audit of May 6, 1925, and in the deficiency letter of December 7, 1925, is correctly determined.

5. The commissioner erred in sustaining the tentative determination of the bureau that the sum of $186,810.69 constitutes the net estate and that the total amount of tax thereon is $3,604.32.

6. The commissioner erred in disallowing the protest made by the taxpayers against the assessment of any additional tax.

39 (e) The facts upon which the taxpayers rely as the basis of their appeal are as follows:

Prior to the year 1923 the premises known as 429 W. Chestnut Avenue, Chestnut Hill, Philadelphia, became vested in the decedent in fee simple. On April 27, 1923, the decedent (her husband joining in the deed) conveyed said premises to Guy B. Watton, his heirs and assigns, in fee simple. On April 30, 1923, the said Guy B. Watton conveyed the said premises to Joseph L. Woolston and Beulah H. J. Woolston, his wife (the decedent), "Their heirs and assigns," "as tenants by the entireties."

The taxpayers aver that the decedent and her husband having been thus seized of said real estate as tenants by the entireties, the title to the whole thereof has now become vested by operation of law in the surviving husband, that neither said real estate nor any interest therein constituted a part of the decedent's estate, and that the same is, therefore, not subject to the Federal estate tax.

(f) The taxpayers in support of their appeal rely upon the following propositions of law:

Property held by husband and wife as tenants by the entireties is not a part of the estate of the spouse who dies first. The entire property automatically becomes the property of the surviving spouse by reason of the nature of the title by which the property was held, and not by virtue of the will of the decedent or by reason of the intestate law. The surviving husband does not take as upon a transfer from the wife at her death, but takes "under the original grant, her estate ceasing." This is in accordance with the decision in the case of Blount against the United States, decided March 3, 1924, Court of Claims of the United States, and now on appeal in the Supreme Court of United States, but not yet decided.

40 Wherefore, the taxpayers respectfully pray that this board may hear and determine their appeal.

GIRARD TRUST COMPANY,
A. A. JACKSON,
Vice President.

Attest:

C. NORRIS, *Secretary.*
JOSEPH L. WOOLSTON,
Executor.

[*Duly sworn to by Joseph L. Woolston; jurat omittted in printing.*]

41 *Exhibit to petition*

TREASURY DEPARTMENT,
Washington, December 7, 1925.

(Cut of seal)
Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
And refer to

MT-ET-Cl.-4273-CLMcC
District of 1st Pennsylvania.
Business of estate of Beulah H. J. Woolston.
Date of death—February 3, 1924.
Deficiency tax—$2,205.32.

GIRARD TRUST COMPANY ET AL.,
Executors estate of Beulah H. J. Woolston,
Broad and Chestnut Streets, Philadelphia, Pennsylvania.

SIRS: The bureau has examined the protest filed by you as executors of the above-named estate against the tentative findings as set forth in its letter addressed to you under date of May 6, 1925.

The protest arises in connection with the following item:

	Jointly owned and other miscellaneous property	Returned	determined
Property known as #429 West Chestnut Avenue, Chestnut Hill, Pennsylvania, jointly held by the decedent and Joseph L. Woolston		$ .00	$93,000

42 This property was included in the tentative audit at the figure herein determined. The estate's protest to the effect that the interest of this decedent is not taxable due to the fact that the property was held by tenancy of the entirety, the interest of the survivor in the whole thereof being just as it was before the death of one of the tenants has been duly noted.

The bureau has given careful consideration to the estate's contentions. The facts involved in this question appear substantially as follows:

Sallie S. Houston conveyed to Beulah H. J. Woolston, this decedent, the realty as her sole and separate estate. The husband's name was not mentioned in the deed. The decedent held this property as her sole and separate estate for about 13 years, when, on April 27, 1923, she conveyed the premises to Guy B. Watton, who, three days later, on April 30, 1923 reconveyed the same to Joseph L. Woolston and Beulah H. J. Woolston, his wife, this decedent, as tenants by the entirety. No consideration whatever passed in these transactions, it being certified in the deed that the consideration in both instances was less than $100, a merely nominal sum. It is very evident that Guy B. Watton was merely used as a straw man in order to acquire title in this decedent and her husband as tenants by the entirety.

The portion of the revenue act of 1921 applicable to the facts at hand in section 402 (d) as construed by article 23, regulations 68, pertaining to estate tax. Therefore, based upon all the facts of record, the application of the revenue act and regulations indicate that the entire value of the property in question properly formed a part of the gross estate of this decedent, as "the decedent furnished the entire purchase price, the entire property should be included in the gross estate." Adjustment is made on this basis.

43 In view of the foregoing, the gross estate is determined to be $253,793.84, the deductions $66,983.15, and the net estate $186,810.69, the tax upon the transfer of which is $3,604.32. As a tax of $1,399 was satisfied by the estate, the deficiency in the tax amounts to $2,205.32.

The deficiency tax herein shown, or such part thereof, if any, as may be ultimately assessed, will bear interest at the rate of ten per centum per annum from and after one month after notice and demand by the collector until paid, in accordance with the provisions of section 407 of the revenue act of 1921.

In accordance with the provisions of Title III, part 1, of the revenue act of 1924 you are allowed sixty days from the date of this letter within which to file an appeal to the Board of Tax Appeals, contesting in whole, or in part, the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the sixty days prescribed, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect to any part of a deficiency will be entertained.

If you acquiesce in this determination, either in whole or in part, and do not desire to file an appeal from the findings in which you acquiesce, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency resulting therefrom, and forward it to the Commissioner of Internal Revenue, Washington, D. C., marked for the attention of the Estate Tax Division, Miscellaneous Tax Unit.

If you desire to appeal from the action of the bureau, as disclosed in this letter, your appeal should be addressed direct to the
44 United States Board of Tax Appeals, Earle Building, 13th & E Streets Northwest, Washington, D. C.
Respectfully,

D. H. BLAIR,
Commissioner.

Enclosure
ACS

[Certificate of foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Answer

Filed March 29, 1926

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, in answer to the petition of the above-named taxpayers, admits, denies, and avers as follows:

1. Admits the allegations set forth in the paragraphs of the petition designated (a), (b), and (c).

2. Denies that error was committed in the determination of the deficiency tax as set forth in the paragraphs of the petition designated (d) 1, 2, 3, 4, 5, and 6.

3. Admits the facts alleged in the paragraph of the petition designated (e) except so much thereof as alleges that neither the said real estate nor any interest therein constituted a part of the decedent's estate and the same is therefore not subject to Federal estate tax, and as to the part excepted denies the same.

45 By way of affirmative defense the commissioner alleges that Beulah H. J. Woolston died February 3, 1924, leaving a net estate the transfer of which is subject to Federal estate tax under the provisions of the revenue act of 1921.

In support of his answer the commissioner relies upon the proposition of law that in the case of a decedent dying while the revenue act of 1921 is in effect, leaving an estate the transfer of which is subject to Federal estate tax, there is properly included in the gross estate for the purpose of determining the Federal estate tax the value of the interest held by the decedent and spouse in any property as tenants by the entirety where such property originally belonged to the decedent.

Wherefore it is respectfully prayed that the determination of the commissioner be approved.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:
J. F. GREALEY,
Special Attorney, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

46 Before U. S. Board of Tax Appeals

Findings of fact and opinion

Filed February 29, 1928

Susie M. Root, executrix, 5 B. T. A. 696; George R. Dyer et al., 5 B. T. A. 711; and Provident Trust Company et al., 5 B. T. A. 1004, followed.

J. Snowdon Rhodes, Esq., for the petitioner; Frank T. Horner, Esq., for the respondent.

SIEFKIN: The facts are simple and are not in dispute. They are that prior to February 3, 1924, certain real estate in Pennsylvania was held by Beulah H. J. Woolston and her husband, Joseph L. Woolston, "their heirs and assigns, . . . as tenants by the entireties." Beulah H. J. Woolston died February 3, 1924, and the respondent included in her estate and subjected to estate tax the entire value of such real estate. The contested portion of the deficiency being considered results from such inclusion.

We have heretofore held that under the laws of Missouri there is no transfer, by reason of the death of one spouse, of any interest or estate of that spouse in an estate by the entirety to the surviving spouse, basing our decision upon a determination that the common-law doctrines of estates by the entirety obtains in Missouri, and concluding that inclusion of the value of real property as part of the gross estate of the decedent was without authority of law under the revenue act of 1921. Susie M. Root, executrix, 5 B. T. A. 696. We held to the same effect where the property was in New York and the revenue act of 1918 was being considered, George R. Dyer et al., 5 B. T. A. 711, and where the property was in Pennsylvania and where the revenue act of 1921 was being again considered, Provident Trust Company et al., 5 B. T. A. 1004. In this pro-
47 ceeding we also have the property situate in Pennsylvania, and are considering the revenue act of 1921, and we adhere to the principles adopted there and hold that the common-law doctrine of estates by the entirety obtains in Pennsylvania; that such doctrine constitutes not only a rule of law but a rule of property which is binding in considering whether or not there is a transfer by reason of the death of one "tenant," and that in fact there is no such transfer. We accordingly hold that the inclusion of the value of such real estate in the gross estate of the decedent was erroneous. See cases above cited and also James C. Murphy et al., 5 B. T. A. 952; Blount *v.* United States, 59 Court of Claims 328; United States *v.* Monroe, 10 Fed. (2d) 230, writ of error to the Supreme Court of the United States dismissed, January 3, 1927.

Reviewed by the board.

Judgment will be entered on 15 days' notice, under rule 50.

MARQUETTE dissents.

[Certificate to foregoing paper omitted in printing.]

48 Before U. S. Board of Tax Appeals

Order of redetermination

Entered May 12, 1928

Pursuant to decision of the board promulgated February 29, 1928, the respondent herein, to wit, on April 13, 1928, filed a proposed redetermination in estate tax, and the petitioner on May 7, 1928, filed notice of acquiescence to the said proposed redetermination, it is

Ordered and decided that there is an overpayment in estate tax in the amount of $22.79.

(Sgd.) FOREST D. SIEFKIN,
Member United States Board of Tax Appeals.

[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Petition of the Commissioner of Internal Revenue for a review of decision of the United States Board of Tax Appeals

Filed November 5, 1928

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, Assistant Attorney General, and C. M. Charest, general counsel, Bureau of Internal Revenue, and respectfully shows:

49 I

That he is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that Beulah H. J. Woolston, a resident of the State of Pennsylvania, died on February 3, 1924; that she left a will which was duly admitted to probate on February 9, 1924, by the Orphans' Court of the city and county of Philadelphia, in the State of Pennsylvania; that Girard Trust Company, a Pennsylvania corporation, and Joseph L. Woolston, her surviving husband, were nominated in said will as executors thereof and were duly appointed by said court as such executors, and said Girard Trust Company, a corporation, and Joseph L. Woolston are now the duly appointed, qualified, and acting executors of the will of said deceased.

That on or about December 31, 1924, the said Girard Trust Company and Joseph L. Woolston, as such executors, filed a Federal estate tax return for the estate of Beulah H. J. Woolston, deceased,

with the collector of internal revenue at Philadelphia, Pennsylvania; that said Girard Trust Company and Joseph L. Woolston are inhabitants of the State of Pennsylvania.

II

The nature of the controversy is as follows, to wit:

That prior to the year 1923 certain real estate and premises situate in the city of Philadelphia and State of Pennsylvania, known as 429 West Chestnut Avenue, Chestnut Hill, in said city of Philadelphia, became vested in the said Beulah H. J. Woolston in fee simple. On April 27, 1923, the said Beulah H. J. Woolston (her husband joined in the deed) conveyed said premises to one
50 Guy B. Watton, his heirs and assigns, in fee simple. On April 30, 1923, the said Guy B. Watton conveyed the said premises to Joseph L. Woolston and Beulah H. J. Woolston, his wife (decedent), their heirs and assigns, as tenants by the entirety; and the title to said real estate remained in the same situation until and at the death of said Beulah H. J. Woolston.

The executors of the will of said Beulah H. J. Woolston, deceased, appellees herein, in filing an estate tax return for the estate of said deceased failed to include the value of the above-mentioned real estate (held by the deceased and her husband as tenants by the entirety as aforesaid) in the gross estate of said deceased for Federal estate tax purposes.

The Commissioner of Internal Revenue included the value of said real property in the estate of said deceased and subjected to estate tax the entire value of such real estate, and therefore determined a deficiency in estate tax in the sum of $2,205.32 under the provisions of section 402 (d) of the revenue act of 1921 and article 23 of regulations 68.

On January 25, 1926, the aforesaid executors filed a petition with the United States Board of Tax Appeals for the redetermination of the estate tax deficiency above mentioned. A hearing was held before said board on January 19, 1928; the opinion and interlocutory decision of the board was promulgated as of February 29, 1928; and the final order of redetermination of the Board of Tax Appeals was entered on May 12, 1928, in which it was ordered and decided that there is an overpayment in estate tax in the amount of $22.79.

The Board of Tax Appeals held that the common-law doctrine of estates by the entirety obtains in Pennsylvania; that such doctrine constitutes not only a rule of law but a rule of property which is binding in considering whether or not there is a transfer by
51 reason of the death of one tenant, and that in fact there is no such transfer; and further held that the inclusion of the value of the real estate so held by the decedent and her husband in the gross estate of the decedent was erroneous.

III

That said commissioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Third Circuit;

Wherefore he petitions that a transcript of record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Third Circuit and transmitted to the clerk of the said court for filing and appropriate action to the end that the errors complained of may be reviewed and corrected by the said United States Circuit Court of Appeals for the Third Circuit.

IV

The commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the inclusion of the value of the real estate owned by Beulah H. J. Woolston and her husband as tenants by the entirety in the gross estate of Beulah H. J. Woolston, deceased, for Federal estate tax purposes was erroneous.

2. The Board of Tax Appeals erred in holding and deciding that where two persons hold real estate in Pennsylvania as tenants by the entirety that upon the death of one tenant there is no transfer of interest to the other tenant.

52 3. The Board of Tax Appeals erred in failing to hold and decide that the value of the real estate owned by said decedent and her husband as tenants by the entirety should be included in the gross estate of said decedent for Federal estate tax purposes.

4. The Board of Tax Appeals erred in failing to hold and decide that where two persons hold real estate by the entirety in the State of Pennsylvania, that upon the death of one of said persons there is a transfer of estate to the other person which is subject to tax under the Federal estate tax law.

5. The Board of Tax Appeals erred in entering its final order of redetermination that there is an overpayment in estate tax in the amount of $22.79.

6. The Board of Tax Appeals erred in failing to enter a final order of redetermination that there is a deficiency in estate tax due from the appellees herein as executors of the will of said deceased in the sum of $2,205.32.

(Sgd.) MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

[*Duly sworn to by C. M. Charest, jurat omitted in printing.*]

53 [Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Notice of petition for review

To GIRARD TRUST COMPANY,
N. E. Cor. Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

To JOSEPH L. WOOLSTON,
429 West Chestnut Avenue,
Chestnut Hill, Philadelphia, Pennsylvania.

To J. SNOWDEN RHOADS,
601 Commercial Trust Building,
Philadelphia, Pennsylvania.

You and each of you are hereby notified that the Commissioner of Internal Revenue did on the fifth day of November, 1928,
54 file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated at Washington, D. C., this fifth day of November, 1928.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 7th of November, 1928.

(Sgd.) J. M. STEEN,
Vice President,
Executor of the Will of Beulah H. J. Woolston, Deceased.
(Sgd.) J. SNOWDEN RHOADS,
Attorney for Appellees.

[Certificate to foregoing paper omitted in printing.]

55 Before U. S. Board of Tax Appeals

Præcipe for transcript of record

Filed November 10, 1928

To the CLERK, UNITED STATES BOARD OF TAX APPEALS:

In preparing the record in the above-entitled cause for review by the United States Circuit Court of Appeals for the Third Circuit you are requested to include the following documents:

1. The docket entries of proceedings before the board.
2. Pleadings before the board, consisting of petition and answer.
3. Findings of fact and opinion.
4. Final order of redetermination.
5. Petition for review.
6. Notice of filing petition for review with proof of service thereof.
7. This præcipe.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Receipt of a copy of the foregoing præcipe acknowledged this fourteenth day of November, 1928.

JOHN S. SINCLAIR, and
J. SNOWDON RHOADS,
Attorneys for Appellees.

[Certificate to foregoing paper omitted in printing.]

56 [Minute entry of argument and submission, April 10, 1929, omitted in printing.]

57 In United States Circuit Court of Appeals for the Third Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
vs.
GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, EXECUTORS OF THE estate of Beulah H. J. Woolston, respondents

No. 4025. March term, 1929

On petition for review of decision of the United States Board of Tax Appeals

Before BUFFINGTON, WOOLLEY, and DAVIS, *Circuit Judges*

Opinion

Filed Oct. 4, 1929

PER CURIAM.

Affirmed on authority of United States vs. Provident Trust Company of Philadelphia et al. Fed. (2d)

[File indorsement omitted.]

58 In United States Circuit Court of Appeals for the Third Circuit

No. 4025 (List No. 58). March term, 1929

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GIRARD TRUST CO. ET AL., EXRS. B. H. J. WOOLSTON, DEC'D., respondents

Judgment

Filed October 4, 1929

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

Philadelphia, October 4, 1929.

VICTOR B. WOOLLEY,
Circuit Judge.

[File indorsement omitted.]

59 [Clerk's certificate to foregoing transcript omitted in printing.]

60 In United States Circuit Court of Appeals

[Title omitted.]

Order substituting party petitioner

Filed November 22, 1929

In conformity with the motion of counsel for petitioner filed herein,

It is ordered that Robert H. Lucas, Commissioner of Internal Revenue, be substituted as petitioner in the above entitled cause for David H. Blair, former commissioner, and that the said cause be continued and maintained by the said Robert H. Lucas, Commissioner of Internal Revenue, as aforesaid.

Philadelphia, November 22, 1929.

Per curiam BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

61 [Certificate to foregoing paper omitted in printing.]

62 Supreme Court of the United States

No. 546. October term, 1929

Order allowing certiorari

Filed January 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

63 Supreme Court of the United States

No. 547. October term, 1929

Order allowing certiorari

Filed January 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File Nos. 34677, 34678. U. S. Circuit Court of Appeals, Third Circuit. Term No. 546. The United States of America, petitioner, vs. Provident Trust Company of Pennsylvania and Charles Sinkler, Administrators, etc. Term No. 547. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. Girard Trust Company and Joseph L. Woolston, executors, etc. Petition for writs of certiorari and exhibits thereto. Filed December 31, 1929. File Nos. 34677, 34678.

91919—30——3

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA AND Charles Sinkler, Administrators c. t. a. of estate of James K. Young, Deceased

---

No. —

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL Revenue, petitioner

v.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, Executors of the Estate of Beulah H. J. Woolston, Deceased

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION

The Solicitor General, on behalf of the United States of America and the Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit

entered in the above-entitled causes on October 4, 1929. In the *Young case* the decision of the District Court of the United States for the Eastern District of Pennsylvania was affirmed. In the *Woolston case,* the decision of the United States Board of Tax Appeals was affirmed.

QUESTION PRESENTED

Is Section 402 (d) of the Revenue Act of 1921 unconstitutional in so far as it requires (with certain restrictions not here material) that the value of property held by husband and wife as tenants by the entirety be included in the gross estate of the deceased spouse for Federal estate tax purposes?

STATEMENT

Young Case.—The facts as set forth in the statement of claim and admitted by the statutory demurrer, are as follows:

By deeds dated May 8, 1912, July 24, 1901, and September 16, 1903, premises located at 220–222–224 South Sixteenth Street, Philadelphia, Pennsylvania, were conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety. On June 19, 1923, Young and his wife conveyed these premises to one George W. Eyre for a consideration of $160,000, of which $60,000 was paid in cash and $100,000 was taken back by the grantor and his wife as ground rent to yield an annual income of $6,000, title to the ground rent being vested in them as tenants by the entirety. (R. 5.)

By deed dated June 23, 1923, the premises located at 244 South Twenty-first Street, Philadelphia, Pennsylvania, were conveyed to Young and his wife as tenants by the entirety. (R. 5.)

No part of the purchase price of any of the above-mentioned property was furnished by the wife. (R. 5.)

On or about August 28, 1923, Young, then a resident of Pennsylvania, died, leaving surviving him his wife, who was the sole beneficiary under his will. (R. 4.)

Thereafter the respondents Provident Trust Company and Charles Sinkler were appointed the administrators *c. t. a.* of the estate of the decedent. On or about August 26, 1924, they filed with the Collector of Internal Revenue for the First District of Pennsylvania a Federal estate tax return showing no tax liability. Upon the audit of the return, the Commissioner of Internal Revenue, acting under the provisions of Section 402(d) of the Revenue Act of 1921, increased the gross estate by $151,150, which represented the value of the ground rent, and accrued interest thereon, with respect to the property located at 220–222–224 South Sixteenth Street, Philadelphia, and the value of the property known as 244 South Twenty-first Street, Philadelphia. (R. 4–7.)

From notice of a deficiency of $1,244.43, determined by the Commissioner, the respondents appealed to the Board of Tax Appeals, which

entered an order of no deficiency. (5 B. T. A. 1004; R. 6, 7.)

The Commissioner did not acquiesce in this decision, and suit was instituted in the District Court for the Eastern District of Pennsylvania to recover the deficiency in tax. That court held, however, that Section 402(d) of the Revenue Act of 1921, in so far as it required the property held by the decedent and his wife as tenants by the entirety to be included in his gross estate, was unconstitutional, and entered judgment for the administrators. (R. 16.)

The United States thereupon appealed to the Circuit Court of Appeals for the Third Circuit, which, on October 4, 1929, affirmed the decision of the District Court. (R. 20–27.)

Woolston Case.—(As the Board of Tax Appeals stated in its findings of fact and opinion (R. 12) that "The facts are simple and are not in dispute," and therefore did not attempt to set them forth *in extenso,* the following statement of facts is taken not only from the Board's findings but also from the petition, supporting documents, and answer filed before the Board.)

Prior to 1923 (apparently about 1910) certain realty in Pennsylvania became vested in Beulah H. J. Woolston, the decedent, in fee simple, as her sole and separate estate, her husband, Joseph L. Woolston, not being mentioned in the deed. (R. 5, 8, 10.)

On April 27, 1923, the decedent, her husband joining in the deed, conveyed the realty to one Guy B. Watton, his heirs and assigns, in fee simple, who three days later, on April 30, 1923, reconveyed the same to Joseph L. Woolston and Beulah H. J. Woolston, "their heirs and assigns," "as tenants by the entireties." (R. 5, 10, 12.)

Beulah H. J. Woolston died February 3, 1924. (R. 11, 12.) The Commissioner of Internal Revenue included in her gross estate for Federal estate tax purposes the entire value of the real estate held by her and her husband as tenants by the entirety (R. 8), and determined a deficiency in estate tax in the sum of $2,205.32 (R. 9).

From this determination the respondents Girard Trust Company and Joseph L. Woolston, executors of the estate of Beulah H. J. Woolston, took an appeal to the Board of Tax Appeals. In the deficiency letter attached to the petition on appeal filed with the Board (R. 7–10), the Commissioner stated that no consideration whatever passed in the two transactions involving Guy B. Watton above referred to, "it being certified in the deed that the consideration in both instances was less than $100 a merely nominal sum" (R. 8). The respondents did not assign any error as to this finding of the Commissioner in their petition to the Board (R. 3–6), and the Board made no finding to the contrary (R. 12–13).

The Board decided that the inclusion in the decedent's gross estate of the value of the real estate

held by her and her husband as tenants by the entirely was erroneous (10 B. T. A. 1100; R. 12), and entered an order of redetermination stating that there had been an overpayment of the estate tax in the amount of $22.79 (R. 14).

On petition for review filed by the Commissioner, the Circuit Court of Appeals for the Third Circuit, on October 4, 1929, in a *per curiam* decision, sustained the decision of the Board upon the authority of the *Young case,* decided the same day.

STATUTE INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, 279:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
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> * * * * *
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or de-

posited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * *

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In affirming the judgment of the District Court in the *Young case* and in affirming the order of the Board of Tax Appeals in the *Woolston case.*

II. In holding that Section 402 (d) of the Revenue Act of 1921 is unconstitutional in so far as it

requires the value of property held by husband and wife as tenants by the entirety to be included in the gross estate of the deceased spouse for Federal estate tax purposes.

REASONS FOR GRANTING THE WRITS

The decisions in the present cases are in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *United States* v. *Tyler*, 33 F. (2d) 724, which is now pending before this Court on a writ of certiorari granted November 25, 1929 (No. 428, October Term, 1929). In that case the Government filed a memorandum stating that it did not oppose the issuance of the writ because of the conflict resulting from the *Young* decision, and this petition is filed to preserve the rights of the Government pending the decision by this Court of the *Tyler case*.

The same constitutional question is also involved in *Dime Trust & Safe Deposit Company* v. *Phillips*, 30 F. (2d) 395, in which the District Court for the Middle District of Pennsylvania rendered a decision in accord with those of the Circuit Court of Appeals for the Third Circuit in the instant cases, and which is now pending before the latter court on appeal.

Wherefore, it is respectfully submitted that this petition should be granted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

DECEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 546

THE UNITED STATES OF AMERICA, PETITIONER

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA AND Charles Sinkler, Administrators, Etc.

No. 547

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL Revenue, petitioner

v.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, Executors, Etc.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

Provident Trust Company case

The opinion of the Board of Tax Appeals is reported in 5 B. T. A. 1004. The opinion of the United States District Court for the Eastern Dis-

trict of Pennsylvania (R. 6–8) is unreported. The opinion of the Circuit Court of Appeals (R. 11–17) is reported in 35 F. (2d) 339.

Girard Trust Company case

The opinion of the United States Board of Tax Appeals (R. 24) is reported in 10 B. T. A. 1100. The *per curiam* decision of the Circuit Court of Appeals (R. 29) is reported in 35 F. (2d) 343.

JURISDICTION

The judgments of the Circuit Court of Appeals in both cases were entered October 4, 1929. (R. 18, 30.) Petition for writ of certiorari in each case was filed December 31, 1929. Certiorari was granted January 20, 1930. (R. 31.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Revenue Act of 1921 imposes a tax upon the transfer of the net estate of every decedent dying after the passage of the Act. Section 402 (d) provides that the gross estate of the decedent shall include the value of property held by the decedent and any other persons as "tenants in the entirety" with the exception of such part of the property as may be shown to have originally belonged to the survivor. The questions presented are:

1. Whether this provision imposes a direct tax in violation of the third clause of Section 2 and

the fourth clause of Section 9 of Article I of the Constitution.

2. Whether this provision is in contravention of the due process clause of the Fifth Amendment.

STATUTE INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, provides in part as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> * * * * *
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible, or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent

for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * *

By Section 403, provision is made for determining the value of the net estate by deducting certain items and an exemption of $50,000 from the ascertainable gross estate. The value of this net estate is the measure of the tax.

STATEMENT

Provident Trust Company case

The facts as set forth in the statement of claim (R. 1–4) and admitted by the statutory demurrer (R. 4–6), are as follows:

By deeds dated May 8, 1912, July 24, 1901, and September 16, 1903, premises located at 220–222–

224 South Sixteenth Street, Philadelphia, Pennsylvania, were conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety. On June 19, 1923, Young and his wife conveyed these premises to one George W. Eyre for a consideration of $160,000, of which $60,000 was paid in cash and $100,000 was taken back by the grantor and his wife as ground rent to yield an annual income of $6,000, title to the ground rent being vested in them as tenants by the entirety. (R. 2–3.)

By deed dated June 23, 1923, the premises located at 244 South Twenty-first Street, Philadelphia, Pennsylvania, were conveyed to Young and his wife as tenants by the entirety. (R. 3.)

No part of the purchase price of any of the above-mentioned property was furnished by the wife. (R. 3.)

On or about August 28, 1923, Young, then a resident of Pennsylvania, died, leaving surviving him his wife, who was the sole beneficiary under his will. (R. 2.)

Thereafter the respondents, Provident Trust Company and Charles Sinkler, were appointed the administrators c. t. a. of the estate of the decedent. On or about August 26, 1924, they filed with the Collector of Internal Revenue for the First District of Pennsylvania a Federal estate tax return showing no tax liability. Upon the audit of the return, the Commissioner of Internal Revenue, acting under the provisions of Section 402 (d) of the Reve-

nue Act of 1921, increased the gross estate by $151,150, which represented the value of the ground rent, and accrued interest thereon, with respect to the property located at 220–222–224 South Sixteenth Street, Philadelphia, and the value of the property located at 244 South Twenty-first Street, Philadelphia. (R. 2–4.)

From notice of a deficiency of $1,244.43, determined by the Commissioner, the respondents appealed to the Board of Tax Appeals, which entered an order of no deficiency. (R. 4; 5 B. T. A. 1004.)

The Commissioner did not acquiesce in this decision, and suit was instituted in the District Court for the Eastern District of Pennsylvania to collect the deficiency in tax. That court held that Section 402 (d) of the Revenue Act of 1921, in so far as it required the property held by the decedent and his wife as tenants by the entirety to be included in his gross estate, was unconstitutional, and entered judgment for the administrators. (R. 9.) Upon appeal the Circuit Court of Appeals for the Third Circuit affirmed the decision of the District Court. (R. 11–18.)

Girard Trust Company case

As the Board of Tax Appeals stated in its findings of fact and opinion (R. 24) that "The facts are simple and are not in dispute," and therefore did not attempt to set them forth *in extenso,* the following statement of facts is taken not only from the Board's findings but also from the petition,

exhibit thereto, and answer filed before the Board. (R. 19–23.)

Prior to 1923 (apparently about 1910) certain real estate in Pennsylvania became vested in Beulah H. J. Woolston, the decedent, in fee simple, as her sole and separate estate, her husband, Joseph L. Woolston, not being mentioned in the deed. (R. 20, 22, 24.)

On April 27, 1923, the decedent, her husband joining in the deed, conveyed this real estate to one Guy B. Watton, his heirs and assigns, in fee simple, who three days later, on April 30, 1923, reconveyed the same to Joseph L. Woolston and Beulah H. J. Woolston, "their heirs and assigns," "as tenants by the entireties." (R. 20, 22, 24.)

Beulah H. J. Woolston died February 3, 1924. The Commissioner of Internal Revenue included in her gross estate for Federal estate tax purposes the entire value of the real estate held by her and her husband as tenants by the entirety (R. 24), and determined a deficiency in estate tax in the sum of $2,205.32. (R. 26.)

From this determination the respondents, Girard Trust Company and Joseph L. Woolston, executors of the will of Beulah H. J. Woolston, took an appeal to the Board of Tax Appeals. In the deficiency letter attached to the petition on appeal filed with the Board (R. 21–23), the Commissioner stated that no consideration whatever passed in the two transactions involving Guy B. Watton above referred to, "it being certified in the deed that the

consideration in both instances was less than $100, a merely nominal sum." (R. 22.) The respondents did not assign any error as to this finding of the Commissioner in their petition to the Board (R. 19–21), and the Board made no finding to the contrary. (R. 24.)

The Board decided that the inclusion in the decedent's gross estate of the value of the real estate held by her and her husband as tenants by the entirety was erroneous (R. 24; 10 B. T. A. 1100), and entered an order of redetermination stating that there had been an overpayment of the estate tax in the amount of $22.79. (R. 25.)

On petition for review filed by the Commissioner (R. 25–27), the Circuit Court of Appeals for the Third Circuit on October 4, 1929, in a *per curiam* decision (R. 29), sustained the decision of the Board upon the authority of the *Provident Trust Company case,* decided the same day.

The Government in both the above cases applied to this Court for writs of certiorari, which were granted. (R. 31.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In affirming the judgment of the District Court in the *Provident Trust Company case* and in affirming the order of the Board of Tax Appeals in the *Girard Trust Company case.*

II. In holding that Section 402 (d) of the Revenue Act of 1921 is unconstitutional in so far as it

requires the value of property held by husband and wife as tenants by the entirety to be included in the gross estate of the deceased spouse for Federal estate tax purposes.

SUMMARY OF ARGUMENT

These decisions, holding that it was beyond the constitutional power of Congress, by Section 402 (d) of the Revenue Act of 1921, to include in the decedent's gross estate property held with the surviving spouse as tenant by the entirety, are in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Tyler case,* No. 428, which will precede these cases in argument.

The provision for inclusion of estates by the entirety in the estate the transfer of which is taxed by the Federal Estate Tax Act is within the powers of Congress. It does not impose a direct tax. Although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a shifting of economic benefits of property upon the decedent's death, occasioned by the death. This shifting may be the subject of an estate tax. The legal fiction that the survivor of an estate by the entirety acquires no enlarged interest or right should not be held determinative here. The "transfer" which may be the basis of a tax should not be restricted to cases where the title or the property passes but may include also the relinquishment by the decedent of possession, enjoyment or control. All

the interests of the decedent spouse are terminated at his death; and the practical result of the dissolution of the estate by the entirety by the death of one spouse is to transfer to the surviving spouse an unfettered ownership in fee.

This Court held in *Bromley* v. *McCaughn*, 280 U. S. 124, that a tax on gifts *inter vivos* is not a direct tax. Upon the principles applied in that case there can be no constitutional objection to a transfer tax payable at death on the value of property owned by a decedent and conveyed by him to himself and wife as tenants by the entirety after the effective date of the tax Act. If, instead of conveying the property, he had retained it until his death, its value would have been included in the computation of his estate subject to the estate tax. If he had given it to his wife outright during his lifetime, the gift could have been taxed by an Act passed before the date of the gift. If, instead of pursuing either of these courses, he makes a conveyance which operates both as a gift to his wife and as a retention of an interest in the property in himself, the cessation of that interest at his death is a legitimate occasion for a tax.

The tax involved here is properly measured and is neither arbitrary nor capricious, and so does not violate the Fifth Amendment. The tax is imposed upon the "transfer of the net estate" and its amount is the sum of certain percentages of the value of the "net estate." It is necessary to set up this artificial entity as the measure of the tax and

include therein designated classes of property, in order that certain dispositions of property made by a decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, may be reached. The inclusion of estates by the entirety in the taxable net estate is necessary to prevent tax avoidance and it may consequently be supported as a necessary adjunct to the taxation of testamentary transfers, even if standing alone its constitutionality might have been subject to doubt.

ARGUMENT

These cases present questions identical with those in the case of *James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, petitioners,* v. *United States of America,* No. 428, now before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The facts in these cases are similar to those in the *Tyler case* and the same propositions of law are applicable. The pertinent statute here is the Revenue Act of 1921, while in the *Tyler case* the Revenue Act of 1916 was involved, but the differences between the two statutes are immaterial to the questions concerned. (See pp. 29–30 of the Government's brief in the *Tyler case.*)

As these questions are fully argued in the brief for the United States in the *Tyler case,* the petitioners adopt, by reference, the argument in that brief.

In the *Girard case* the item of property in dispute belonged to the decedent, the wife, until April 27, 1923, after the passage of the Revenue Act, and it was not until April 30, 1923, that it was conveyed to her and her husband as tenants by the entirety. It does not appear that the husband, the survivor, furnished any part of the consideration for the purchase of the property originally.

In the *Provident case* one of the items of property in question, the real estate at 244 South Twenty-first Street, was not conveyed to the decedent and his wife as tenants by the entirety until June 23, 1923, after the effective date of the applicable Revenue Act. The situation is similar as to the other item of property. The title to the ground rent, which the Commissioner included in the gross estate, was not vested in the decedent and his wife until June 19, 1923. Although it was part of the consideration for the conveyance of property which had belonged to the decedent and his wife as tenants by the entirety prior to the date of the passage of any Act providing for a Federal estate tax, the fact remains that the tenancy in the property included in the gross estate did not arise until after that date, and indeed, if that were necessary, until after the passage of the Act of 1921. No part of the purchase price of any of the property was furnished by the survivor, the wife. (R. 3.)

It appears that all of the items in question were originally owned by or were purchased by the decedent alone. It does not appear that any interest

in the property was given to the survivor by a third person. As to all items, it is consequently clear that the taxpayers have no ground for complaint. Although the findings in regard to some of the matters are somewhat meager, the lacunæ are of no avail to the taxpayer. It is settled that in an action like this the taxpayer carries the burden of establishing all facts necessary to a recovery. *Reinecke* v. *Spalding*, 280 U. S. 227; *Botany Mills* v. *United States*, 278 U. S. 282; *United States* v. *Mitchell*, 271 U. S. 9; *United States* v. *Anderson*, 269 U. S. 422. It is also settled that an assessment made by the Commissioner is *prima facie* correct. *Wickwire* v. *Reinecke*, 275 U. S. 101, 105; *United States* v. *Rindskopf*, 105 U. S. 418, 422.

CONCLUSION

It is respectfully submitted that the judgments of the Circuit Court of Appeals for the Third Circuit in both cases herein should be reversed.

WILLIAM D. MITCHELL,
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CLAUDE R. BRANCH,
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ERWIN N. GRISWOLD,
Attorney.

APRIL, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

IN THE

Supreme Court of the United States.

October Term, 1929.

Nos. 546 and 547.

UNITED STATES OF AMERICA, *Petitioner.*

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA and CHARLES SINKLER, Administrators C. T. A. of Estate of JAMES K. YOUNG, deceased.

ROBERT H. LUCAS, Commissioner of Internal Revenue, *Petitioner,*

v.

GIRARD TRUST COMPANY and JOSEPH L. WOOLSTON, Executors of the Estate of BEULAH H. J. WOOLSTON, deceased.

MOTION OF RESPONDENTS TO ADVANCE.

Comes now John S. Sinclair and Williams, Myers & Quiggle, attorneys for the respondents in the above entitled causes, and move that these cases be advanced for hearing with the case of *James E. Tyler, Jr.*, and *William G. Tyler, Administrators of the Estate of James E. Tyler, Deceased*, v. *United States of America*, October Term, 1929, No. 428, and in support of their motion make the following brief statement of the matter involved, and the reasons relied upon for the advancement.

STATEMENT OF THE MATTER INVOLVED.

These cases present the question of whether Section 402 (d) of the Revenue Act of 1921 is unconstitutional in so far as it requires that the value of property held by husband and wife as tenants by the entirety be included in the gross estate of the deceased spouse for Federal estate tax purposes.

In the *Young* case, the facts are that James K. Young and Mary Wilson Young, his wife, acquired as tenants by the entirety several parcels of real estate in Philadelphia. Later, they conveyed some of them for a consideration part paid and the balance secured by a ground rent, reserved to themselves as tenants by the entirety, to yield them a certain annual income, redeemable at a named figure.

James K. Young died in 1923. The Commissioner of Internal Revenue, upon review and audit of the estate tax return made by his administrators, included in the decedent's gross estate the value of the ground rent and other property, so held, and determined a deficiency in the sum of $1,244.43. From this action Young's administrators appealed and the Board of Tax Appeals entered judgment against the Commissioner. The United States then brought suit in the District Court against Young's administrators to collect the additional tax so determined. The court held that the Congress, by including for taxing purposes, in the gross estate of a decedent, property held by him and his wife as tenants by the entirety, exceeded its constitutional power and entered judgment for the defendants.

The United States thereupon appealed to the Circuit Court of Appeals for the Third Circuit, which on October 4, 1929, affirmed the decision of the District Court.

In the *Woolston* case the identical question was presented, the Commissioner of Internal Revenue attempting to include in the gross estate of Beulah H. J. Woolston, who died February 3, 1924, the entire value of the real estate held by her and her husband as tenants by the entirety. The said Commissioner found a deficiency in estate tax in the sum of $2,205.32, from which determination the executors appealed to the Board

of Tax Appeals. The Board determined the Commissioner's action to be erroneous and entered an order of redetermination, stating that there had been an overpayment of the estate tax in the amount of $22.79. On petition for review filed by the Commissioner, the Circuit Court of Appeals for the Third Circuit, on October 4, 1929, in a *per curiam* decision, sustained the decision of the Board upon the authority of the *Young* case, decided the same day.

The United States, thereupon, on or about December 31, 1929, filed a petition for a writ of certiorari with this Court in both the *Young* and *Woolston* cases, and the respondents have filed a waiver of their right to file a brief in opposition to the granting of a writ of certiorari.

REASONS RELIED UPON FOR THE ADVANCEMENT.

There is now pending before this Court on a writ of certiorari granted November 25, 1929, the case of *James E. Tyler, Jr.*, and *William G. Tyler, Administrators of the Estate of James E. Tyler, Deceased*, v. *United States*. In that case, James E. Tyler, a resident of Maryland, died May 7, 1918. Certain property, at the date of his death, was owned by Tyler and his wife as tenants by the entirety. The Commissioner of Internal Revenue included the value of this property in the decedent's gross estate, thereby increasing the estate tax by $3,337.67, which was paid by the administrators. A claim for refund was seasonably filed, and, upon its rejection, the administrators entered suit for recovery of this amount in the United States District Court for the District of Maryland. That Court rendered judgment for the taxpayer, which judgment was reversed by the Circuit Court of Appeals for the Fourth Circuit on July 6, 1929, and rendered an opinion holding that Congress intended to tax tenancies by the entireties and that such a tax was not in violation of the Constitution.

The decision of the Circuit Court of Appeals for the Fourth Circuit in the *Tyler* case is, accordingly, in conflict with the

decisions of the Circuit Court of Appeals for the Third Circuit in the *Young* and *Woolston* cases. The same question is involved in all three of these cases, and while the *Tyler* case involves the construction of the Revenue Act of 1916 and the *Young* and *Woolston* cases involve the construction of the Revenue Act of 1921, the provisions of these Acts under consideration in these cases are substantially the same.

Wherefore, the respondents pray that the cases be advanced upon the calendar and assigned for hearing at the same time that the case of *United States* v. *Tyler*, October Term, No. 428, is heard.

Respectfully submitted,

JOHN S. SINCLAIR,
WILLIAMS, MYERS & QUIGGLE,
By PAUL F. MYERS,
Counsel for Respondents.

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QUESTIONS PRESENTED 1

STATEMENT 2

SUMMARY OF ARGUMENT 2

ARGUMENT:

I. To the Extent that the Applicable Statute requires to be included in the Value of the Decedent's Gross Estate, the Value at the Time of Death of Property held by the Decedent and Spouse as Tenants by the Entirety under the Law of Pennsylvania, it imposes a Direct Tax on such Property, which, being unapportioned, is in Violation of the Limitations prescribed by the Third Clause of Section 2 and the Fourth Clause of Section 9 of Article I of the Constitution 3

A. The tax imposed by the applicable statute is indirect only to the extent that it reaches property, or interests therein, passing as a result of the exercise by the decedent of the privilege of transmitting property at death . 4

B. Under the law of Pennsylvania, which is controlling, no interest in property held by a decedent and spouse as tenants by the entirety passes at the death of one tenant, to the survivor, by virtue of the exercise by the decedent tenant of the privilege of transmitting property at death; and, therefore, in such case the subject or event upon which the tax must be predicated is wanting 17

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IN THE

Supreme Court of the United States

October Term, 1929.

No. 546.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

PROVIDENT TRUST COMPANY OF PHILADELPHIA AND CHARLES SINKLER,
Administrators, etc.

No. 547.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON,
Executors, etc.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

QUESTIONS PRESENTED.

The respondents concur in the statement of the questions involved as contained in the brief of the petitioners, pages 2 and 3.

STATEMENT.

The respondents accept the statement of facts as contained in the brief of the petitioners, pages 4 to 8.

SUMMARY OF ARGUMENT.

The Federal estate tax can be imposed only upon the exercise of the privilege of transmitting property at death. Under the law of Pennsylvania, which is controlling, the interest of a decedent tenant by the entirety in property held by himself and his spouse as tenants by the entirety does not, upon his death, pass to the surviving tenant by virtue of the exercise of the privilege of transmitting property at death. There was no shifting of economic benefits, because the decedent tenant had no power of control whereby he could before or after death deprive the tenant who survived of the possession and enjoyment of the property acquired by virtue of the creative instrument. Nor did the use and enjoyment of the property first pass or shift to the survivor upon the death of the decedent tenant. Since the decedent tenant's interest in such property is not transmitted at death, there is no event upon which the imposition of an estate tax can be constitutionally predicated. The Revenue Act of 1921, by requiring the inclusion in the gross estate of the value of property held by a decedent and his spouse as tenants by the entirety, imposes a direct tax on such property; and since the tax is unapportioned, it is unconstitutional. If, however, the intent of the Congress was merely to include the value of property held by the decedent and his spouse as tenants by the entirety in the measure of the tax to be imposed on the transmission of other property, then the tax, so measured, is arbitrary, whimsical and capricious and violates the due process clause of the Fifth Amendment. The mere desire to equalize taxation, or to prevent tax avoidance or evasion will not justify a burden on something not within the power of the Congress to tax.

ARGUMENT.

I.

TO THE EXTENT THAT THE APPLICABLE STATUTE REQUIRES TO BE INCLUDED IN THE VALUE OF THE DECEDENT'S GROSS ESTATE, THE VALUE AT THE TIME OF DEATH OF PROPERTY HELD BY THE DECEDENT AND SPOUSE AS TENANTS BY THE ENTIRETY UNDER THE LAW OF PENNSYLVANIA, IT IMPOSES A DIRECT TAX ON SUCH PROPERTY, WHICH, BEING UNAPPORTIONED, IS IN VIOLATION OF THE LIMITATIONS PRESCRIBED BY THE THIRD CLAUSE OF SECTION 2 AND THE FOURTH CLAUSE OF SECTION 9 OF ARTICLE I OF THE CONSTITUTION.

By Section 8 of Article I of the Constitution, Congress is given the general power "to lay and collect taxes, duties, imposts and excises," except on exports, and subject only to the following restraints or limitations: (1) direct taxes must be imposed by the rule of apportionment (Constitution, Article I, Section 2, Clause 3, and Section 9, Clause 4); and (2) indirect taxes by the rule of uniformity (Constitution, Article I, Section 8, Clause 1). See the quotation from the opinion of Mr. Chief Justice White in Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, at pages 12-14 (1915), printed as Appendix A to this Brief at page 61; Scholey v. Rew, 90 U. S. 331 (1875).

It has been decided that the various estate taxes imposed by the several Revenue Acts are not generally taxes imposed upon property because of its ownership, but taxes on its transmission at death. Knowlton v. Moore, 178 U. S. 41 (1900), New York Trust Company v. Eisner, 256 U. S. 345 (1921) and Y. M. C. A. v. Davis, 264 U. S. 47 (1924). There must be some transmission or transfer of property effected by the death of the decedent. In the absence of

such transmission or transfer, there is no privilege or exercise of any right toward which the taxing power may be directed and the tax can fall nowhere except directly on the property in question, and will therefore be a direct tax and unconstitutional, unless apportioned. See opinion of Kirkpatrick, J., in the Provident Trust Company case in the Eastern District Court of Pennsylvania, Record pp. 6, 7. "As the present tax is not apportioned, it is forbidden if direct": Mr. Justice Stone, speaking in reference to the gift tax in Bromley v. McCaughn, 280 U. S. 124 (1929); Hylton v. U. S., 3 Dall. 171 (1796); Pollock v. Farmers' Loan and Trust Company, 157 U. S. 429, 158 U. S. 601 (1895). The Revenue Act of 1921 contains no provision for apportionment, and therefore to the extent that its provisions result in imposing a tax upon property solely by reason of its ownership, and regardless of its use or disposition, it contravenes the Constitutional limitation concerning the apportionment of direct taxes.

The fundamental question in each of the instant cases is whether or not the Congress has exceeded its powers in requiring the inclusion in the value of the gross estate of the value of property held by the decedent and spouse as tenants by the entirety.

It becomes pertinent, first, to look at what the Congress has attempted to reach by the tax imposed pursuant to the provisions of the applicable statute.

A. The Tax Imposed by the Applicable Statute is Indirect only to the Extent that it Reaches Property, or Interests Therein, Passing as a Result of the Exercise by the Decedent of the Privilege of Transmitting Property at Death.

Section 401 of the Revenue Act of 1921, C. 136, 42 Stat. 227, imposes "upon the transfer of the net estate of every decedent dying after the passage of this Act" a tax equal to certain specified percentages of the value of such net estate.

In Section 403, it is provided that the value of the net estate shall be determined by subtracting from the value of the gross estate certain deductions specified therein. The method for determining the value of the gross estate is prescribed by Section 402, which provides, in part:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .
> * * * * * * * * * *
>
> "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* that where such property or any part thereof, or, part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof; * * * "

Death duties have always been regarded as excise or indirect taxes because imposed upon the happening of an

excisable event, viz, the transfer or transmission of property at death. Their history and nature have been exhaustively reviewed by Mr. Justice White in the course of his opinion in KNOWLTON v. MOORE, 178 U. S. 41 (1900), where he said:

> "Taxes of this general character are universally deemed to relate, not to property eo nomine, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe. Smith's Wealth of Nations, London Ed. of 1811, Vol. 3, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes, for the reason that all inheritance and legacy taxes are considered as levied on the 'occasion of a particular isolated act.' This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:
>
> > 'Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange.' " (p. 47)
>
> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed

them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears:

"Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." (pp. 55-56)

There are two general classes of death duties: probate or estate taxes; and legacy or succession taxes. The subject of an estate tax is the exercise of the privilege of transmitting property at death. The subject of a succession tax is the exercise of the privilege of succession to, or of receiving property at death by devise or descent. The subject of an estate tax constitutes one phase of a transfer at death; the subject of a succession tax constitutes the other phase thereof. This is illustrated by the opinion of Mr. Justice Stone in STEBBINS v. RILEY, 268 U. S. 137 (1925), at page 144:

"There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation."

Mr. Justice Stone had previously said (page 141):

> "*The subject-matter of an inheritance taxing statute may be either the transmission or the exercise of the legal power of transmission of property by will or descent* (United States v. Perkins, 163 U. S. 625, 629, 16 S. Ct. 1073, 41 L. ed. 287; Plummer v. Coler, 178 U. S. 115, 125, 20 S. Ct. 829, 44 L. ed. 998; New York Trust Co. v. Eisner, 256 U. S. 345, 41 S. Ct. 506, 65 L. ed. 963, 16 A. L. R. 660), or it may be the legal privilege of taking property by devise or descent (Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037; Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; Campbell v. California, 200 U. S. 87, 26 S. Ct. 182, 50 L. ed. 382)." (Italics ours.)

The object of an estate tax, or that upon which the burden falls, is the interest in property which ceases at the decedent's death, whereas the object of a succession tax is the interest to which the heir, devisee or legatee succeeds. In this connection, Mr. Justice White, in KNOWLTON v. MOORE, supra, said (page 77):

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

See also Y. M. C. A. v. Davis, 264 U. S. 47 (1924).

All death duties, whether estate or succession taxes, have this much in common: that the event upon which the tax is imposed and the occurrence of which (insofar as the

Federal Government is concerned) imparts to the exaction the quality of an indirect tax, is *the transfer or transmission of property at death.* For if there is no transfer at death, it necessarily follows that neither the privilege of transmitting property at death, nor the privilege of succeeding to property at death has been exercised.

The general nature of the tax intended to be imposed by Section 401 of the Revenue Act of 1921, and the several similar Revenue Acts, has been considered in numerous decisions of this Court. From them it clearly appears that the intent of the Congress was to impose an estate tax upon the transmission by the decedent at his death of the various interests in property the values of which are directed by the Act to be included in the value of the gross estate and which mediately become included in the net estate. See opinion of Chairman Horner, of the United States Board of Tax Appeals, in Appeal of Root, 5 B. T. A. 696. The subject of the tax is the exercise by the decedent of the privilege of transferring at his death the property interests included in the net estate. The object of the tax, or the interest upon which it is chargeable and out of which it is deductible, is the interest which ceases at death, rather than the interest to which the heir, devisee or legatee succeeds.

Thus, in Y. M. C. A. v. DAVIS, 264 U. S. 47 (1924), Mr. Chief Justice Taft said (p. 50):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties, as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death."

In EDWARDS v. SLOCUM, 264 U. S. 61 (1924), this Court, through Mr. Justice Holmes, said (p. 62):

> "But this is not a tax upon a residue; it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in Knowlton v. Moore, 178 U. S. 41, 49, 77, 20 Sup. Ct. Rep. 747, 44 L. ed. 969. It comes into existence before, and is independent of, the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 20 Sup. Ct. Rep. 751, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.'"

Similarly, in CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327 (1929), it was held (p. 334):

> "The statute in terms taxes transfers. *Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death.*" (Italics ours.)

In REINECKE v. NORTHERN TRUST CO., 278 U. S. 339 (1929), this Court said (p. 347):

> "*In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred.*" (Italics ours.)

See also NEW YORK TRUST CO. v. EISNER, 256 U. S. 345, 349 (1921); GREINER v. LEWELLYN, 258 U. S. 384 (1922); NICHOLS v. COOLIDGE, 274 U. S. 531, 537 (1927).

From the foregoing decisions it becomes apparent that the Federal Estate Tax is an indirect tax only when and because it is imposed on the exercise of the privilege of transmitting property at death. A tax which purports to be an estate tax, but which actually reaches property not transferred by the decedent at his death, or the transmission of which is not occasioned by his death, is an excise in form only; in reality it is a direct tax, imposed solely by virtue of the ownership and possession of the property so reached by the tax. See Bromley v. McCaughn, 280 U. S. 124 (1929). Insofar as the Congress, by Section 402 of the Revenue Act of 1921, has required the inclusion in the value of the decedent's gross estate of the value of property transferred by him at his death, it has merely exercised its undoubted power to lay an indirect tax upon the transfer of property at death, measured by the value of the interest which passes thereby. But to the extent that it has required the inclusion in the value of the gross estate of the value of any property not transferred at death, it has attempted to exercise a power expressly denied it by the Constitution, the power to levy unapportioned direct taxes. It is immaterial that the tax is in form an estate tax; for it is the substance, not the form, that determines the nature of a tax. DAWSON v. KENTUCKY DISTILLERIES AND WAREHOUSE CO., 255 U. S. 288, 292 (1921).

In NICHOLS v. COOLIDGE, supra, an unsuccessful attempt was made to subject to the Federal estate tax, imposed by the Revenue Act of 1919, certain property not transferred by the decedent at death. In his opinion, Mr. Justice McReynolds said (p. 541):

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. *But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond*

them. Taxes are very real things and statutes imposing them are estimated by practical results." (Italics ours.)

Unless, therefore, upon the death of one tenant by the entirety his interest in the property held by himself and his spouse as tenants by the entirety is transferred to the surviving tenant, the inclusion of the value of such interest in the decedent tenant's gross estate constitutes the imposition of a direct tax under the guise of an indirect tax.

Property can be said to pass at death, so as to constitute the proper subject of an estate tax, only when death is the occasion of severing the decedent from the unlimited power of control over the present and future disposition of such property after his death. Obvious examples of transfers at death are where property passes by will or under the intestate laws. In such cases it is within the power of the decedent at any time prior to his death to alter or direct the present and future course of the property; it passes from his complete control only at death.

This Court has, on previous occasions, considered the nature of other taxable transfers occasioned by death.

In CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327 (1929), the facts were briefly as follows: The decedent had procured three insurance policies on his life, his wife being named therein as beneficiary. In all three policies the power to change the name of the beneficiary was reserved solely to the decedent. The decedent died without having exercised any of the reserved powers. It was contended that the proceeds of the insurance policies could not be included in the decedent's gross estate for estate tax purposes because they were not transferred by the decedent at his death. This contention was disposed of in the opinion of Mr. Justice Stone as follows (pp. 334-5):

"But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, *as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.*

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 38 S. Ct. 36, 62 L. ed. 143; see Burlingham v. Crouse, 228 U. S. 459, 33 S. Ct. 564, 57 L. ed. 920, 46 L. R. A. [N. S.] 148), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, (Domestic Relations Law, N. Y., Chapter 14, Consol. Laws, Sec. 52); Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433; Guardian Trust Co. vs. Straus, 139 App. Div. 884, 123 N. Y. S. 852, affirmed 201 N. Y. 546, 95 N. E. 1129, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death." (Italics ours.)

And at pages 336-7:

"Such an outstanding power residing exclusively in a

donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

Related principles were involved in REINECKE v. NORTHERN TRUST CO., 278 U. S. 339 (1929). The decedent had created by deed seven trusts. In two of the deeds of trust it was provided that the income from the trusts was to be paid to the settlor during his lifetime and after his death the income, and, ultimately, the principal were to be paid to certain designated beneficiaries. A power of revocation of these two trusts was reserved to the settlor alone. Under the provisions of the remaining five trusts, the income was to be paid to certain designated life tenants other than settlor, and, after the settlor's (decedent's) death, the corpus was to be paid to the remaindermen. "With respect to each of these five trusts a power was also reserved 'to alter, change, or modify the trust,' which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly." (p. 344) The settlor died without any of the powers of revocation having been exercised.

As to the two trusts, where the decedent had the exclusive power of revocation, it was held that the transfers were not completed until death and could therefore be subjected to an estate tax. ". . . a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death." (p. 345)

As to the remaining five trusts, however, it was held that no transfer occurred at the decedent's death, for the following reasons (page 346):

"If it be assumed that the power to modify the trust

was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

This Court further pointed out in the Reinecke case that the mere fact that a transfer is intended to take effect in possession or enjoyment at or after death of the transferor, who has not retained any possession or enjoyment, is not, in itself, sufficient to render the transfer incomplete until death and so taxable as a transfer at death (pp. 347-9).

It will be noted that in each of the above instances where a transfer at death occurred, the decedent, up to the very moment of his death, could have defeated the right of the transferee to the property after his death by the exercise of powers of control vested in him alone. The transfers were incomplete until the decedent's death, because then, for the first time, the property passed beyond the possibility of recall by him. On the other hand, in the case of the five trusts in the Reinecke case, the transfers, as to the transferor, were complete the moment (prior to death) the trusts were created because his exclusive power to control the future ownership and enjoyment thereof ceased at such time. In this connection Judge Woolley, speaking for the Circuit

Court below in the Provident Trust Company case, after referring to the Reinecke and Chase National Bank cases and Saltonstall v. Saltonstall, 276 U. S. 260 (1928), said (Record, p. 13):

> "In all these cases the transfers had not been completely effected or the privilege of succession or the right of possession or enjoyment fully exercised before death. But in all death terminated reserved powers of control and effected final transfers to the advantage of those who had obtained the properties subject to the powers."

In MAY v. HEINER, October Term, 1929, No. 311 (decided April 14, 1930—not yet reported), Mrs. May, the decedent, had on October 1, 1917, created a trust, under the terms of which the income from the trust property was to be paid to her husband during his lifetime, and, after his death, to herself during her lifetime. Upon her death the principal was to be divided among her children, their distributees, or appointees. The Commissioner of Internal Revenue attempted to include the value of the trust property in the decedent's gross estate for estate tax purposes, claiming that the trust was one created "in contemplation of or intended to take effect in possession or enjoyment at or after . . . death", within the meaning of Section 402 (c) of the Revenue Act of 1918. This Court, in reversing judgment for the Commissioner, stated:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event.
>
> "The transfer of Oct. 1, 1917, was not made in contemplation of death within the legal significance of those words. *It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the*

trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." (Italics ours)

Thus it will be seen that the privilege of transmitting property at death is exercised if, and only if, then for the first time the decedent parts with the exclusive and unlimited power to control the present and future disposition of the property.

Keeping these principles in mind, the next question is whether the interest of a tenant by the entirety under the law of Pennsylvania is transferred, upon his death, to the surviving tenant, as a result of an exercise by the decedent tenant of the privilege of transmitting property at death. The answer to this question depends upon the nature and incidents of an estate by the entirety as it exists under the law of Pennsylvania.

B. Under the Law of Pennsylvania, which is Controlling, no Interest in Property held by a Decedent and Spouse as Tenants by the Entirety Passes at the Death of one Tenant, to the Survivor, by Virtue of the Exercise by the Decedent Tenant of the Privilege of Transmitting Property at Death; and, therefore, in such Case the Subject or Event upon Which the Tax Must be Predicated is Wanting.

The common law doctrine of tenancy by the entirety, unmodified, was at an early date incorporated into and has always been retained as a part of the law of Pennsylvania. Being based on the marital relationship, the estate can be created only by or between husband and wife. The fundamental nature of this estate was considered at length by the Supreme Court of Pennsylvania in the leading case of BEIHL v. MARTIN, 236 Pa. 519 (1912). Speaking for the Court, Mr. Justice Stewart said (pp. 522-3):

"It may be that because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estate by entireties has outlived the purpose of its creation and is out of harmony with present conditions. However, this may be, if change is desired, it must come through legislative action and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife; it is therefore a unit not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one while the rights of survivorship remain to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unity made up of divisible parts; that of a husband and wife is also a unity, but is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either, the survivor takes a new estate. He acquires by survivorship the moiety of his deceased co-tenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either, the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct

merely reduces the legal personage holding the estate to an individual identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.' Stuckey vs. Keefe, 26 Pa. 397."

The legal unity of husband and wife has not been abolished in Pennsylvania, nor has the nature of an estate by the entirety been in any way affected by the various Married Women's Property Acts.

In DIVER v. DIVER, 56 Pa. 106 (1867), it was argued that the effect of the Act of April 11, 1848, P. L. 536, was to destroy estates by the entirety. The Supreme Court of Pennsylvania, in an opinion by Mr. Justice Strong, later of this Court, held (p. 109):

> "The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property by removing it from under the dominion of the husband. . . . The Act therefore no more destroys her union with her husband than does a settlement of property for her own use."

A similar contention in respect of the Act of June 8, 1893, P. L. 344, was rejected in the case of MEYER'S ESTATE (No. 1), 232 Pa. 89 (1911). The Court said (p. 91):

> "The contention of appellant, is that this venerable and unique common-law estate has been abolished in Pennsylvania by the Act of June 8, 1893, P. L. 344, not in express terms, but by unavoidable implication. The Act of June 8, 1893, was meant as a substitute for the earlier Act of June 3, 1887, P. L. 332, which it expressly repeals. The primary object in each was the same—to emancipate married women from restraints and disqualifications with which they had been fettered by the common law. The later act embraces within its

scope all that was gained for married women by the earlier; and at the same time it removes other disqualifications which the earlier left undisturbed; but it can no more be affirmed of one than of the other, that it discloses a legislative purpose to change the nature of any estate which married women could theretofore have acquired, or destroy or in any way interfere with the legal unity which characterizes the relation of husband and wife, in deference to which and for its better protection perhaps, this peculiar estate by entireties was invented."

In GASNER v. PIERCE, 286 Pa. 529 (1926), the Supreme Court of Pennsylvania, in an opinion by Mr. Justice Sadler, said (pp. 531-2):

"The property in question was admittedly owned by Mr. and Mrs. Pierce, and, as a result, a tenancy by entireties arose, which has been defined as an interest 'held by a husband and wife together so long as both live, and, after the death of either, by the survivor so long as the estate lasts:' 13 R. C. L. 1096. 'The essential characteristic of (the estate) is that each spouse is seized of the whole or the entirety and not of a share, moiety, or divisible part. . . . There is but one estate, and, in contemplation of law, it is held by but one person:' 30 C. J. 564; 13 R. C. L. 1114. This interest, arising from the unity of person, has not been abolished by our so-called Married Women's Acts (13 R. C. L. 1101), passed April 11, 1848, P. L. 536 (Diver v. Diver, 56 Pa. 106), June 3, 1887, P. L. 332 (Bramberry's Est., 156 Pa. 628), or June 8, 1893, P. L. 344: Meyer's Est. (No. 1), 232 Pa. 89. Nor is it affected by the more recent legislation (May 24, 1923, P. L. 446; May 13, 1925, P. L. 649), authorizing the sale of such estates, when ordered to secure support of the wife, or after divorce has been granted."

The "more recent legislation" referred to in the foregoing quotation, and likewise the Act of May 10, 1927, P. L. 884 (West's Penna. Statutes, 1928 Supp. Secs. 10172b-1 to 4) "authorizing the sale of such estates, when ordered, to secure support of the wife, or after divorce has been granted," do not, of course, provide a means whereby one tenant can, at his will, sever the estate. For, one tenant can secure a support order or a divorce only if the other tenant, by his actions, has furnished the grounds therefor.

An estate by the entirety is not terminated by divorce of the tenants. O'Malley v. O'Malley, 272 Pa. 528 (1922), at 532: "We have held, however, that after a divorce the estate retains the incidents which pertained to it at its inception: Alles v. Lyon, 216 Pa. 604."

Because each tenant by the entirety is seised of the whole, and not of a share or moiety, certain well-recognized incidents naturally attach to this estate.

Each tenant, from the inception of the estate, is entitled to the entire use and enjoyment of the whole estate. The following statement of Montague, C. J., in Plowden, 58, was quoted with approval in McCURDY v. CANNING, 64 Pa. 39 (1870), at pages 40-41:

> " 'the husband has the entire use and the wife has the entire use, for there are no moieties between husband and wife.' "

In MEYER'S ESTATE (No. 2), 232 Pa. 95 (1911), the Court, holding that husband and wife, tenants by the entirety, could not be required to enter security for the protection of the husband's trustee in bankruptcy, in the event of the husband's surviving the wife, said (p. 96):

> "The wife's right to present enjoyment of the estate is not to a part, but to all of it; and this may not be denied her in order to protect a contingent interest of one claiming through the husband. To impose such con-

dition upon the exercise and enjoyment of her right, as was here directed, resolves the estate into a tenancy in common. *Being an estate by entirgties, neither husband nor wife could, under any circumstances, require an accounting by the other; nor could either restrain the other against consuming more than an equal part.*" (Italics ours.)

Since each tenant is entitled to possession of the whole, it follows that either tenant can by his or her sole act rent the property, and that payment of rent by the lessee to either husband or wife constitutes a full discharge: GASNER v. PIERCE, 286 Pa. 529 (1926). For the same reason, where husband and wife own a mortgage as tenants by the entirety, after the death of the wife the husband is entitled to receive and retain *all* of the interest accruing prior to the wife's death; the wife's personal representative has no right thereto whatever: McLAIN, Ex'r, v. HINDEN, 10 District and County Reports 663 (1927).

A tenancy by the entirety cannot be severed by partition proceedings: McCURDY v. CANNING, 64 Pa. 39, 41 (1870). "No action of *partition*, or *waste*, or *account*, or *ejectment*, can be maintained by one against the other:" STUCKEY vs. KEEFE'S EX'RS., 26 Pa. 397, 401 (1856).

During the joint lives of husband and wife, the estate can be terminated only by their joint act. Thus, in MEYERS' ESTATE (No. 1), 232 Pa. 89, 94 (1911), the Court said:

> "In estates of this kind, husband and wife are not joint tenants or tenants in common, but both are seized of the entirety, per tout et non per my. As a consequence neither can dispose of any part without the consent of the other, but the whole must remain to the other."

The Superior Court of Pennsylvania, in Milano et ux v. Fayette Title and Trust Co., 96 Pa. Super. Ct. 310

(1929), held that money deposited in a bank in the joint names of a husband and wife could be drawn out only on checks signed by both, and that the bank was liable for money paid out on checks signed only by the husband. Judge Keller, speaking for the Court, said (p. 314):

> "The right of survivorship of a true tenancy by entireties, which is one of its chief incidents, cannot be destroyed but by the joint act of the two: Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060, 1062. Neither husband nor wife can sever a true tenancy by the entirety: Palmer v. Mansfield, 222 Mass. 263, 110 N. E. 283, 284; Marble v. Jackson, 245 Mass. 504, 139 N. E. 442, 444."

See also McCURDY v. CANNING, 64 Pa. 39, 41 (1870); PENNSYLVANIA TRUST CO. v. MISCHIK, 96 Pa. Super. Ct. 255 (1929).

Neither husband nor wife can dispose of their respective interests, not even their expectancy of survivorship, in property held by themselves as tenants by the entirety, without the consent of the other. The reason for this is clearly set forth in the following quotation from BEIHL v. MARTIN, 236 Pa. 519, 527-8 (1912):

> "A little reflection upon the nature of the estate by entireties should make it apparent, we think, that while the estate continues it is utterly impossible for either party, without the other joining, to sell or assign his or her interest therein, even the expectancy of survivorship. The rights of the parties are fixed by the deed of conveyance to them, and by that instrument each took an entirety made up of indivisible parts. Any alienation by one, the other not consenting, of any interest whatever in the estate, if allowed, would be an abridgement, pro tanto, of the rights of the other. By their joint act they admittedly have the right to sell and dispose of the whole estate; by their joint act they

> may strip the estate of its attributes and create a wholly different estate in themselves; but neither can divest himself or herself of any part without in some way infringing upon the rights of the other."

It was further decided in the above case that neither the husband's interest nor his expectancy of survivorship could be taken in execution at the suit of a separate creditor, the Court saying (p. 528):

> "Now stating it broadly but correctly, nothing can be taken in execution and sold as the property of a debtor except property over which the debtor has the right of disposition by sale or otherwise. If then the husband cannot sell or dispose of his expectancy of survivorship, it follows that it may not be taken in execution."

Furthermore, a judgment against either the husband or the wife does not constitute an encumbrance upon property held as tenants by the entirety. "If the husband may not alien his right of expectancy, and if because of this the expectancy may not be taken in execution—since in either case it would be an appropriation of the wife's right of property in that it would deprive her of the right to sell with the husband's consent—for equal reason a judgment operating as a lien upon the husband's expectancy would be an interference with the wife's right of alienation with the consent of the husband, except as that lien is divested by such sale:" BEIHL v. MARTIN, supra (p. 528). See also A. HUPFEL'S SONS v. GETTY, 292 Fed. 178 and 299 Fed. 939.

An estate by the entirety remains entirely unaffected by bankruptcy proceedings against one tenant, and the trustee in bankruptcy acquires no rights whatever with respect to the bankrupt's interest in the estate. See Beihl v. Martin, supra; Meyer's Estate (No. 1), 232 Pa. 89 (1911);

Meyer's Estate (No. 2), 232 Pa. 95 (1911); Weiss v. Beihl, 232 Pa. 97 (1911).

Each tenant being seised *per tout et non per my*, upon the death of the one tenant, the survivor receives no new estate; he merely *continues* in the possession and enjoyment of the entire estate vested in him under the terms of the creative instrument, as the following quotations from Beihl v. Martin, supra, clearly demonstrate:

> "Each is seised of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate." (pp. 522-3)
>
> "There remains to the husband a right of survivorship, by virtue of which, in case he survive the wife, while taking no estate, yet because the entirety in the wife is by her death extinguished, his entirety embraces every interest in the estate." (pp. 526-7.)

Upon the death of one tenant, his interest in the property is simply extinguished. It cannot pass to his heirs or under his will, nor is it transferred to the surviving tenant. The moment the estate was created the surviving tenant became invested with the entire fee, together with the right of immediate possession and enjoyment of the whole thereof. After the decedent's death the surviving spouse holds precisely the same interest as before; *she receives no additional rights which were formerly enjoyed, possessed or controlled by the decedent;* her rights are only those which accrued to her under the terms of the original grant, and which vested irrevocably in her upon the creation of the estate.

Since no interest formerly enjoyed, possessed or controlled by a decedent tenant by the entirety passes to the surviving tenant at the decedent's death, it has been held in Pennsylvania that a succession tax cannot be imposed at death upon the interest of a tenant by the entirety. In

ESTATE OF HENRY G. FINK, DECEASED, 6 Erie County Law Journal 281 (1922), it was contended by the Commonwealth of Pennsylvania (taxing authority) that the surviving tenant acquired the decedent's interest in the estate by the entirety as a result of a transfer intended to take effect in possession or enjoyment at or after death, and that the provisions of the Pennsylvania Inheritance Tax Law taxing such transfers were therefore applicable. The Court said, in rejecting this contention:

> "Whenever a deed is made to husband and wife with the right of survivorship, they take by entireties, and the right to present possession or enjoyment arises at once in favor of both grantees and is not postponed until the death of one, or dependent upon who may be the ultimate survivor and the whole owner in fee by operation of law." (p. 289)

The foregoing decisions serve to illustrate how the Courts of Pennsylvania have assiduously preserved the fundamental character of an estate by the entirety and the various attributes which naturally and logically attach to it. As Judge Woolley said (Record, p. 14): "A tenancy by the entirety in Pennsylvania retains in their purity all the characteristics of its English origin."

The Legislature, likewise, has always refrained, in inheritance tax matters, from modifying the nature of this estate as it existed at common law and in the Act of May 16, 1929, P. L. 1795, 1797, has expressly excepted estates by the entirety from the operation of the Pennsylvania Transfer Inheritance Tax Law by the following language:

> "(e) Whenever any property, real or personal, is held in the joint names of two or more persons, except as tenants by the entirety, or is deposited in banks or other institutions or depositories in the joint names of two or more persons, except as husband and wife, and

payable to either or the survivor upon the death of one of such persons, the right of the surviving person or persons entitled to the immediate ownership or possession and enjoyment of such property shall be deemed, prima facie, a transfer of one-half, or other proper fraction thereof, taxable under the provisions of this act, in the same manner as though this part of the property to which such transfer relates belonged to joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving person or persons by such deceased joint tenant or joint depositor by will."

This statute was enacted in order to obviate the effect of the decision in Leach's Estate, 282 Pa. 545 (1925), holding that joint estates were not taxable.

It is the settled law not only of Pennsylvania but of practically all other jurisdictions where tenancy by the entirety, as it existed at the common law, is recognized, that upon the death of one tenant his interest does not pass to the surviving tenant, and that the latter takes no new estate.

In BEDDINGFIELD v. ESTILL AND NEWMAN, 118 Tenn. 39, 100 S. W. 108, 9 L. R. A. (N. S.) 640 (1907), it was held that a husband who murdered his wife is not deprived of his right to property formerly held by himself and his wife as tenants by the entirety; and that a statute, providing that one who shall feloniously kill any person from whom he would be entitled to take property by inheritance, will or otherwise shall forfeit all right to such property, is inapplicable; for the husband acquired no interest in the property through or under his wife.

In PALMER v. TREASURER and RECEIVER GENERAL, 222 Mass. 263, 110 N. E. 283 (1915), it was held that the surviving tenant acquires from the decedent tenant no interest which is subject to a succession tax upon real estate which passes "by the laws regulating intestate succession"

(St. 1909, c. 490, Part IV, Sec. 1, as amended by St. 1912, c. 678, Sec. 1). In so holding, the Court said (pp. 264-5):

"The peculiar nature of a tenancy by the entirety frequently has been considered by this court. It can arise only where the ownership is vested in husband and wife. As was said by Field, J., in Pray v. Stebbins, 141 Mass. 219, 221: 'This tenancy by entireties is essentially a joint tenancy, modified by the common law doctrine that husband and wife are one person.' The difference between a joint tenancy and a tenancy by the entirety is that joint tenants take by moieties and are each seized of an undivided moiety of the whole, per my et per tout, which draws after it the incident of survivorship unless either party in his life time severs the jointure.

"On the other hand neither husband nor wife can sever a tenancy by the entirety. They do not take by moieties but by entireties. Neither can alienate a moiety so as to defeat the title to the survivor in the whole. Shaw v. Hearsey, 5 Mass. 521. Wales v. Coffin, 13 Allen, 213. Pray v. Stebbins, 141 Mass. 219. Hoag v. Hoag, 213 Mass. 50.

"When a tenancy by the entirety is created, the husband and wife take the estate as one person, and they take but one estate. In view of the nature of such an estate, on the death of either husband or wife *no beneficial interest accrues to the other by survivorship so as to create succession, and so no part of the estate was subject to the tax.*

"Upon the death of the testator no estate in the property in question passed to his widow. It belonged to her from the time when the tenancy by the entirety was created. In the event that she survived her husband, upon his death she took no new title by survivorship, but held under the deed by virtue of which she was originally seized of the whole. 21 Cyc. 1198, 1199.

1 Washb. Real Prop. (6th ed.) Sec. 912. Enyeart v. Kepler, 118 Ind. 36.

"Upon the testator's death the estate simply was freed from participation by him. The complete title of a surviving tenant by the entirety is not acquired by intestate succession, but by reason of the nature of the estate. See Attorney-General v. Clark, post, 291; Matter of Klatsl, 216 N. Y. 83." (Italics ours.)

A similar question was involved in the case of Lyon's Estate, 233 N. Y. 208, 135 N. E. 247 (1922), where the Court of Appeals of New York decided that an amendment to the Inheritance Tax Laws of New York (Cons. Laws, c. 60, Sec. 220, subd. 7), which provided that the right of a surviving tenant by the entirety "to the immediate ownership and enjoyment of the property shall be deemed a taxable transfer," had no application to a tenancy by the entirety created prior to the enactment of the amendment (1916), even though the decedent died subsequent thereto, and that the right of the surviving tenant was not taxable. The opinion of Judge Andrews contains a comprehensive statement of the nature of an estate by the entirety and is therefore quoted below at considerable length:

"When on July 31, 1908, a house and lot was conveyed to Edmund Lyon and to Carolyn, his wife, as tenants by the entirety, they became seized of an estate having well recognized attributes. Whatever the original reasoning upon which this estate was based, the rules with regard to it had long become a part of the law of real property consistently enforced in New York. In re Klatsl's Estate, 216 N. Y. 83, 110 N. E. 181. Husband and wife were not joint tenants. One did not acquire the rights and property of the other by survivorship. The fee was indivisible. As an entirety it was vested in both. For this purpose they were con-

sidered one and not two. On the death of either the fee vested in the other, not because there was a transfer of any part of the estate, but because the survivor was the representative of the single ownership. The rule was a technical one. So are many of the rules affecting real estate. We appeal to history and not to logic for the explanation. (p. 211)

* * * * * * * * *

"Whatever power the legislature may have with regard to such estates later created does not extend to those already vested before the adoption of the amendment. In re Pell's Estate, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540, 89 Am. St. Rep. 791. This estate by the entirety with all its incidents was vested in Mr. and Mrs. Lyon in 1910. What was then acquired may not subsequently be diminished by a tax upon that acquisition. As there was no transfer after 1916, there can be no tax. Mrs. Lyon now has what she had in 1910, no more and no less. In re McKelway's Estate, supra." (p. 212)

It is significant that in the foregoing case it was held that the 1916 Amendment could not be accorded retrospective operation. In so holding the Court recognized that a statute which declares that the right of a surviving tenant by the entirety "to the immediate ownership and enjoyment of the property shall be deemed a taxable transfer" effects a radical change in the fundamental nature of an estate by the entirety. The several states concededly have the power to change their respective rules of property. But in so doing they must not disturb vested interests. Under the New York law, prior to 1916, the interest of a decedent tenant by the entirety was not, upon his death, transferred to the surviving tenant. But on the death of a joint tenant, under the New York law prior to 1916, a one-half interest in the joint property was considered to have been transfer-

red, at the death of one tenant, to the survivor. The 1916 Amendment, by its terms, applied to both tenancies by the entirety and joint tenancies. It provided that the right of the surviving tenant in each case shall be deemed to be a taxable transfer of the whole estate. As to tenancy by the entirety, the effect of this Amendment was to create a transfer where formerly none occurred. And because the creation of this transfer involved a material change in the basic character of an estate by the entirety, it could apply only to estates subsequently created. As to estates by the entirety, the Amendment was more than a taxing statute; it constituted a new rule of property.

As to joint tenancies, on the other hand, the Amendment created a transfer of one-half of the joint property where formerly none would occur, and, pro tanto, altered the nature of the estate; but in respect of the remaining half of the joint property, it merely declared what had formerly been the law of New York. As to the one-half, which under the former law was not transferred at death, the Amendment was both taxing statute and rule of property, and so could apply only to estates subsequently created; but as to the other half, which had always been regarded as being transferred at death, it was only a tax law and so could apply to estates created prior to its passage, provided the decedent died subsequent thereto.

The foregoing principles were recognized and applied in In re McKELWAY'S ESTATE, 221 N. Y. 15, 116 N. E. 348 (1917). In this case the Court of Appeals of New York, in an opinion by Judge Pound, held that where husband and wife acquired property as joint tenants, and not tenants by the entirety, prior to the passage of the 1916 Amendment, and the husband died after its passage, one-half of the property jointly held may be taxed, but not all. In pointing out the distinction between a joint tenancy and a tenancy by the entirety, Judge Pound said: "Upon the vesting of an estate by the entirety, both tenants become

seised of the whole estate, and upon the death of one the survivor acquires no new or additional interest by survivorship." (p. 19)

Pennsylvania could, if it saw fit, change the nature of a tenancy by the entirety and provide that upon the death of one tenant his interest shall be transferred to the surviving spouse. But it has not done so. The Congress, however, has no power whatsoever to make any such change. See Cooley, Constitutional Limitations, 8th Ed. Vol. I, p. 11: "The Government of the United States is one of *enumerated powers;* the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national Government assumes to possess." See also Note 3 on page 11, MARTIN v. HUNTER'S LESSEE, 1 Wheat. 304, 326, 4 L. ed. 97, 103, and LINDER v. UNITED STATES, 268 U. S. 5, 69, L. Ed. 819, 45 Sup. Ct. Rep. 446. The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In HUNT v. BLACKBURN, 128 U. S. 464, 469 (1888), this Court recognized that where land was conveyed to husband and wife, "each became seized of the entirety per tout et non per my; the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant".

In UNITED STATES v. ROBERTSON, 183 Fed. 711 (C. C. A., 7th—1910), certiorari denied in 220 U. S. 616, the question involved was whether the share of a decedent joint tenant to which his co-tenant succeeded was subject to a legacy tax under the provisions of Section 29 of the War Revenue Act of 1898. In its opinion the Court said (p. 714):

"Did the title of defendant to one-half of the

share that James Law possessed in his lifetime vest on the execution of the contract, or did it vest only after the death of James Law? Defendants' insistence upon an affirmative answer to the first alternative comes, we believe, from *a confusion of estates in entirety with estates in joint tenancy. Survivorship is a characteristic of both. In estates by the entirety the title of each is to the whole, and from this it inevitably follows that no adverse act of the one can destroy the right of survivorship in the other. When the one dies the other takes nothing by a new title of survivorship; he merely ceases to divide the enjoyment of an estate of which he was completely seized by virtue of the creative instrument.*" (Italics ours.)

The nature and incidents of the tenancies by the entirety involved in the instant proceedings must be determined according to the law of Pennsylvania. "'It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances'": Clarke v. Clarke, 178 U. S. 186, 191 (1900), quoting from the case of DEVAUGHN v. HUTCHINSON, 165 U. S. 566, 570 (1897).

A recent statement of the same rule is found in the case of EDWARD HINES YELLOW PINE TRUSTEES v. MARTIN, 268 U. S. 458 (1925), where Mr. Justice Stone stated:

> "To avoid the uncertainty and injustice which result from the 'discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right' (Brine v. Insurance Company, 96 U. S. 627), this Court has not hesitated when there has been a

> conflict of decision between it and the State Courts affecting a rule of property within the State, to overrule its own decisions and to follow the State decisions, once it has become evident that they have established a 'rule of property' as a settled law of the State." (p. 464.)

See also UNITED STATES v. TITLE INSURANCE AND TRUST CO., 265 U. S. 472, 486 (1924).

This principle applies in matters of federal taxation, as well as all other matters. UNITED STATES v. ROBBINS, 269 U. S. 315 (1926); TALCOTT v. UNITED STATES, 23 Fed. (2d) 897 (C. C. A., 9th—1928); ALLEN v. HENGGELER, ADM'R, 32 Fed. (2d) 69 (C. C. A., 8th), certiorari denied in 280 U. S. 72A; CROOKS v. HARRELSON, 35 Fed. (2d) 416 (C. C. A., 8th).

Therefore, the interest of a decedent tenant by the entirety is transferred at his death to the surviving tenant, only if the law of Pennsylvania declares that it shall be. But under the law of Pennsylvania, the decedent tenant's interest, instead of being transferred, is wiped out. It does not pass to the survivor, or to any one else. The survivor takes no new estate. Before the decedent's death, the survivor was seized of the entire estate and entitled to the present possession and enjoyment of the whole thereof; after the death she is still seized of the whole and entitled to possession and enjoyment thereof. Death did not terminate any power in the decedent to control or direct the use or enjoyment of the property after his death, by the exercise of which he could have defeated the survivor's right; he never possessed any such power. He could not possibly, at his own will, have defeated the right of the survivor to the property or the use and enjoyment thereof, either before or after his death, either by alienation, partition, the creation of incumbrances, bankruptcy or divorce. After the death of the

tenant, the survivor does not, for the first time, begin to use and enjoy the property. She continues in the possession and enjoyment of the whole property not because the decedent's interest has been transferred to her, not because the decedent has died without exercising reserved powers to deprive her of her estate, but because of and in the exercise of rights irrevocably vested in her by the original grant. This is the situation as it exists under the state rules of property; and this is the situation which the Congress, in taxing the decedent's interest, must accept. It cannot, in order to create a transfer upon which to predicate an estate tax, take away, in derogation of the law of Pennsylvania, the interest of which the survivor became seized and possessed at the time of the creation of the estate and, in its place, substitute the defunct interest of the decedent. Under the law of Pennsylvania there is no transfer. The decedent did not, at his death, exercise (nor did there then terminate) any power of control on his part over the use and enjoyment of the property held under such tenancy which this Court has determined to constitute that "shifting of the economic benefits and burdens of property" which might constitutionally become the proper subject of an estate tax. Because the taxable occasion is absent, there can, therefore, be no estate tax.

The privilege of transmitting property at death is the only privilege upon the exercise of which the Congress, by Section 401 of the Revenue Act of 1921, attempted to impose a tax. Since, in each of the instant cases, this privilege was not exercised by the decedent in respect of his interest in the property held with his spouse as tenants by the entirety, the tax was imposed directly, instead of indirectly, on such interest; and being unapportioned, the tax is unconsitutional.

II.

INSOFAR AS THE APPLICABLE STATUTE REQUIRES THE INCLUSION IN THE VALUE OF THE GROSS ESTATE OF THE VALUE OF PROPERTY NOT TRANSFERRED BY THE DECEDENT IN THE EXERCISE OF THE PRIVILEGE OF TRANSMITTING PROPERTY AT DEATH, IT CONTRAVENES THE FIFTH AMENDMENT OF THE CONSTITUTION.

The objection to the constitutionality of the Act cannot be met by saying that the decedent's interest in an estate by the entirety is merely used as a measure for a tax to be imposed upon the transfer of other property. In the first place, this was not the intent of the Congress as construed by this Court. "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death, and is measured by the value at death of the interest which is transferred": REINECKE v. NORTHERN TRUST CO., 278 U. S. 339, 347 (1929). To the same effect, see CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327, 334 (1929). See also the opinion of Chairman Horner in Appeal of Root, 5 B. T. A. 696.

In NICHOLS v. COOLIDGE, 274 U. S. 531 (1927), an effort was made to justify the imposition, pursuant to the provisions of Section 402, paragraph (c) of the Revenue Act of 1919, of a tax on an interest in property not transferred at death, on the theory "that the challenged subsection only undertakes to tax the transfer from the dead and merely uses the gross estate to measure a charge". (p. 539.) This Court refused to adopt such a construction of the Act, for the reason that the "language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death". (pp. 540-1.)

But if it were the intent of the Congress to use the value of the decedent's interest in an estate by the entirety merely as a measure for a charge to be imposed on the transfer of other property, the tax would be so arbitrary and capricious as to contravene the due process clause of the Fifth Amendment. This Court has recognized that the imposition of a tax measured by a standard which disregards the distinction between what is taxable in itself and what is not taxable in itself in such a way as to amount to a tax on that which is not taxable, constitutes a taking of property without due process of law. FRICK v. PENNSYLVANIA, 268 U. S. 473 (1925).

In NICHOLS v. COOLIDGE, supra, it was held the Congress was without power to require the inclusion of the value of property not transferred at or in contemplation of death in the measure of a tax to be imposed on the transmission of other property at death. In this case Mr. Justice McReynolds stated, at page 541:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things, and statutes imposing them are estimated by practical results."

And at page 542:

> "Under the theory advanced for the United States the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions not testamentary in character and beyond recall. Property of small value transferred before death may become immensely valuable, and the estate tax, swollen by this, may leave

nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable."

To the same effect see FREW v. BOWERS, 12 Fed. (2d) 625, 629 (C. C. A., 2nd—1926), certiorari allowed in 273 U. S. 682.

III.

CONSIDERATION OF PETITIONERS' ARGUMENT.

In Part II of their argument, Counsel for the petitioners argue that "although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a shifting of economic benefits of property upon the decedent's death, occasioned by the death". However, in order to show that the "shifting" which constitutes the subject of an estate tax has occurred, no effort is made to point out any interest of the decedent tenant, which was, at his death, transferred to the surviving tenant in the exercise of the privilege of transmitting property at death; nor is any attempt made to prove that death terminated absolute powers vested in the decedent to deprive the surviving tenant of her interest in the property, or in any way to interfere with her possession and enjoyment thereof. It is merely contended that "all the interests of the decedent spouse, including his right of survivorship, are terminated at his death". Reduced to its essence, the argument of the petitioners is, that the bare cessation of an interest at death may constitute the subject of an estate tax. This argument utterly ignores the fundamental principle laid down

in Knowlton v. Moore, supra, and frequently reaffirmed by this Court, that "the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its *transmission* or receipt by will, or as the result of intestacy" (p. 47, Italics ours). It also overlooks an all important factor, namely, that the surviving tenant's actual use and enjoyment of the property did not first come into existence upon the death of the decedent, but began upon the creation of the estate prior to death, which in each of the instant cases was admittedly not in contemplation of death.

The decisions of this Court in the cases of CHASE NATIONAL BANK v. UNITED STATES, supra, and REINECKE v. NORTHERN TRUST CO., supra, are relied upon as authority for the proposition that, merely because the decedent's interest in the property held as tenants by the entirety has been terminated at death, such property may therefore be subjected to an estate tax.

It will be recalled that, in the Chase National Bank case, the decedent had taken out several policies of insurance on his life, naming his wife as beneficiary, but reserving solely to himself the power to change the name of the beneficiary at any time prior to his death. The decedent died without having changed the beneficiary. It was held that the inclusion of the proceeds of the policies in the value of the gross estate did not constitute the imposition of a direct tax, nor was the due process clause of the Fifth Amendment thereby violated. In so holding, this Court distinctly recognized that the tax is imposed "on the privilege of transferring the property of a decedent at death" (page 334). It also recognized that the cessation at death of an interest in property may result in a transfer of property at death, providing the interest which has ceased includes the unlimited power to control the present and future disposition of the property, both dur-

ing and after the decedent's lifetime. The nature and scope of the decedent's interest in the insurance policies were defined in the opinion of Mr. Justice Stone, from which the following excerpts are taken:

> "But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them." (page 334).
>
> "A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors . . . and which may, under local law applicable to the parties hereto, subject them in part to the payment of his debts . . . is by no means the least substantial of the legal incidents of ownership, . . ." (page 335).

It was then pointed out that the retention by the decedent of such a comprehensive power, whereby he could, at his will, recall or otherwise defeat the gift of the interest in the policies to the beneficiary, rendered such gift incomplete until his death, at which time the power was terminated.

> "Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." (pages 336-7.)

The controlling factor in the Chase National Bank case was quite obviously the retention until death by the dece-

dent of the power to direct or control the use or economic enjoyment of the property both during his lifetime and after his death.

> ". . . we think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, *so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control* at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, Chanler v. Kilsey, 205 U. S. 466, 27 S. Ct. 550, 51 L. Ed. 882." (page 338, Italics ours)

In concluding it was stated:

> "As it is *the termination of the power of disposition* of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, *together with all the other interests of decedent transferred at his death.*" (page 339, Italics ours)

In the foregoing case the transfer remained incomplete, as to the decedent, until death because he could at any time prior thereto have recalled it. The termination by death of the decedent's interest in the policies resulted in a transfer at death because the interest which ceased

included the power to take away or otherwise destroy the beneficiary's interest. The tax in this case was not imposed upon the cessation of the decedent's interest in the property: it was imposed on the *transfer at death* resulting from or completed by the cessation of the decedent's interest in the property.

In the case of REINECKE v. NORTHERN TRUST CO., supra, (the facts of which are stated at pages 14 and 15 of this brief), it was held that in the case of the two trusts created by the decedent during his lifetime, where the power to revoke at any time prior to his death was reserved to himself alone, the transfers to the beneficiaries were completed only at death. As in the Chase National Bank case, the interest in the trust property retained by the decedent until his death included the exclusive and unlimited power to control the present and future ownership and enjoyment of the property. Consequently, it was held that termination of such an extensive interest at death completed the transfer commenced prior thereto. The tax was imposed upon the transmission of the trust property at death resulting from the termination of the power to revoke, but not upon the termination itself. ". . . a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death". (page 345.)

It was, however, recognized in the Reinecke case that the operative moment at which a transfer becomes complete as to the transferor is not necessarily postponed by reason of the retention by the transferor of an interest which does not include the exclusive and unlimited power to control the future disposition of the property. In the case of the five trusts the settlor (decedent) reserved to himself the "power to supervise the reinvestment of trust funds, to require the trustee to execute proxies, to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to ap-

point successor trustees". In addition to the above powers of management the decedent also reserved to himself the power to "alter, change or modify" the trusts with the consent of the single beneficiary in the case of four of the trusts, and with the consent of a majority of the beneficiaries in the case of the fifth trust. It was held that the transfers of the beneficiaries' interests in these five trusts were completed, as to the transferor, the moment the trusts were created, regardless of the reserved powers. Mr. Justice Stone said (pages 346-47):

> "If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
>
> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall

> the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."

Recognizing that, because the transfers in the case of these five trusts were completed prior to the decedent's death and also prior to the passage of the applicable Revenue Act, there would be serious doubts as to the constitutional validity of the Act, if construed so as to tax such transfers as transfers at death, this Court construed it in such a way as to exclude these particular trusts from its operation.

The Chase National Bank and the Reinecke cases do not hold that an estate tax may be imposed merely upon the cessation of an interest. To the contrary, it is explicitly affirmed in both cases that *the subject of an estate tax is the exercise of the privilege of transmitting property at death.* These cases are authority for the proposition that an estate tax can be imposed upon the transfer of property at death resulting from the cessation of an interest. But the mere cessation of every interest in property does not result in a transfer at death. Termination of an interest in property at death results in the exercise by the decedent of the privilege of transmitting property at death (which alone is the subject of an estate tax), only when the interest which has terminated embraces the exclusive and unlimited power to control the use or economic enjoyment of the property both during the lifetime and after the death of the decedent. A transfer of property by a decedent during his lifetime remains, as to him, incomplete until death, only if he reserves to himself alone the unrestricted power to control the present and future disposition of the property. The reason for this is because a transfer is complete, as to the transferor, at the

operative moment when it passes beyond possibility of recall by him at his will.

The death of a decedent tenant by the entirety does not result in the termination of any interest comparable to that vested in the decedent in the Chase National Bank case, or in the settlor (decedent) of the two trusts in the Reinecke case. The decedent tenant by the entirety has no power at his will to take his spouse's interest away from her and either keep it for himself or give it to another. He could not sever the estate without the consent of his spouse. He could not dispose of his right to the possession and enjoyment of the property during their joint lives. He could not even convey his expectancy of survivorship. The property could not be subjected to the payment of his debts, nor could it in the least way be affected by bankruptcy proceedings against him. In short, his wife's interest in the estate and right to the possession and enjoyment of the property is entirely beyond his control or interference. Nor does his death first bring about his spouse's enjoyment of the economic benefits of the property. The fact that the decedent tenant may have furnished the consideration for the purchase of the property held as tenants by the entirety is of no moment. The effect of the creation of the estate is to make an absolute gift to the wife of an immediate interest in the whole property as tenant by the entirety. The gift is complete, as to the donor, upon the creation of the estate because it is irrevocable. After the decedent tenant's death the survivor enjoys the identical estate which she enjoyed prior thereto; and this interest was, from the inception of the estate, free from any control by the decedent. The decedent tenant, has, during his lifetime, even less control over the interest of the surviving tenant than did the settlor of the five trusts in the Reinecke case have in respect of the trust estates. Therefore, the termination by death of the decedent tenant's interest in the estate by

the entirety does not have the effect of completing the original transfer of an interest in the estate to the surviving tenant. The only result of his death was to obliterate his interest: it did not render absolute a transfer, theretofore revocable or partial.

On page 16 of the brief for the United States in the Tyler case an effort is made to regard as immaterial this absence of the power in the decedent tenant to divest the interest of the surviving tenant. It is difficult to see how the single feature upon which the decision of a particular case (Reinecke case) is based can be dismissed as inconsequential. That the power of control is not immaterial is most forcefully indicated by the fact that in the case of the five trusts in the Reinecke case, where it was absent, this Court held that the transfer was complete, as to the transferor, the moment the trusts were created.

In determining whether or not the privilege of transmitting property at death has been exercised by the decedent tenant, the test is not whether the interest of the surviving tenant became absolute upon his death. As to the settlor of the five trusts in the Reinecke case, the transfers were completed upon their creation, although the interests of the beneficiaries did not necessarily become absolute until the settlor's death; for the trusts might have been revoked during his lifetime with the consent of the single beneficiary in the four trusts and a majority of the beneficiaries in the fifth case. (In this connection, see the distinction between estate and succession taxes drawn by Mr. Justice Stone, in referring to Saltonstall v. Saltonstall, supra, at pages 335-6 of the Chase National Bank case.)

In FIDELITY-PHILADELPHIA TRUST COMPANY v. McCAUGHN, 34 Fed. (2d) 600 (C. C. A., 3rd), certiorari denied in 280 U. S. 80 A, it was held that the exercise of a power of appointment by a decedent constitutes the exercise of the privilege of transmitting prop-

erty at death, and can therefore be subjected to an estate tax. In such a case, as in the Chase National Bank case and the two trusts in the Reinecke case, the decedent possessed up to the very moment of his death the exclusive power to control the disposition of the property after his death. But a decedent tenant by the entirety possesses no such power, nor does he, by any means, have the exclusive use or enjoyment of the property. It is significant that although this case was decided a short time prior to the cases involved in the instant appeals and by the same Court, yet no mention was made of it in Judge Woolley's opinion.

At page 16 of the brief for the United States in the Tyler case, it is stated that where an owner of property conveys a vested remainder, reserving possession for his life, upon his death there is a transfer of the remainder. McCaughn v. Girard Trust Co., 11 Fed. (2d) 520 (C. C. A., 3d), is cited as authority for this proposition. This case also was decided by the same Court as decided the Provident Trust Company and Girard Trust Company cases. In McCaughn v. Girard Trust Co., the question decided by the Court was one of statutory construction and not of constitutional power. In FREW v. BOWERS, 12 Fed. (2d) 625 (C. C. A. 2d); certiorari allowed in 273 U. S. 682, and subsequently withdrawn by the Government, (cited in Nichols v. Coolidge, 274 U. S. 531, 542), under an identical set of facts, it was held that the inclusion in the gross estate of the value of property transferred irrevocably by the decedent to a trustee, to pay the income to the decedent for life and upon his death to pay the principal to designated beneficiaries, constituted the imposition of an arbitrary and whimsical tax, in violation of the due process clause of the Fifth Amendment. In both cases the property was conveyed to the trustee prior to the date of passage of the applicable Revenue Acts (as well as prior to the date of passage of the Rev-

enue Act of 1916); in both cases the trusts were irrevocable; in both cases the decedents reserved to themselves the income for life. In Frew v. Bowers, where the constitutional question was raised, it was decided that the transfer was complete upon the creation of the trust. If the transfer had remained incomplete until the decedent's death, no objection could have been raised to the inclusion of the property in the gross estate, even though the trust had been created prior to the passage of the applicable Revenue Act. Reinecke v. Northern Trust Co., supra.

Doubt as to the correctness of the result in the case of McCaughn v. Girard Trust Co. is expressed in the opinion of Judge Dickinson in the case of Carnill, Ex'rx., v. McCaughn, 30 Fed. (2d) 696, (D. C. E. D. of Pa.) (now pending in the Circuit Court of Appeals of the 3rd Circuit). In refusing to follow the Girard case, he said (page 699):

> "Here these two truths are present, because there was a vested remainder and a life estate in the same property. The doctrine of the Girard case would in consequence apply. The real question is whether there has not been since the Girard case a modification of the doctrine there (and in many other cases) laid down, particularly since the rulings in the Cooldige case (supra), and in the Reinecke v. Northern Trust Company and Chase National Bank v. United States opinions which have just been handed down. We think there has been this modification".

The views of Judge Dickinson are borne out by the decision of this Court in MAY v. HEINER, supra.

Furthermore, the nature and incidents of an estate by the entirety and an irrevocable trust, with life estate reserved to the settlor and remainder to another, are entirely dissimilar. In the case of the former, each tenant becomes invested, upon the creation of the estate, with a

present right to the use and enjoyment of the *whole*. Upon the decedent tenant's death his usufruct of the property does not pass to the surviving tenant; it merely ceases. The surviving tenant continues to exercise the identical right to the use and enjoyment of the property which she exercised prior to the decedent's death.

On the other hand, at the time of creation of the irrevocable trust, the present right to the economic benefits of the property is vested in the life tenant alone. The remainderman receives only a future right. His usufruct of the property is postponed until the life tenant's death. Upon the death of the life tenant, the economic use and enjoyment of the property might more easily be said to shift from him to the remainderman.

Likewise, the cases dealing with dower, curtesy and other similar interests, which have been cited on pages 16 and 17 of the brief for the United States in the Tyler case, involved interests patently different from those of tenants by the entirety. In Randall v. Krieger, 90 U. S. 137 (1875), this Court defined the inchoate right of dower at common law as follows (p. 148):

> "During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it or wholly take it away. *It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor.* Until that event occurs, the law of descent and distribution may be molded according to the will of the Legislature". (Italics ours)

To the same effect see United States v. Waite, 33 Fed. (2d) 567 (C. C. A., 8th), certiorari denied 280 U. S. 98 A.

The extent of the power of control which the husband, during his lifetime, possesses over the wife's right of dower was pointed out in the opinion of Judge McDermott in ALLEN v. HENGGELER, 32 Fed. (2d) 69, certiorari denied 280 U. S. 72 A.

A portion of his opinion follows (p. 72):

> "Giving full weight to the Nebraska court's description of the wife's interest, the facts still remain that the husband has at least the following very substantial rights in such property:
>
> "He has the exclusive right of possession; the exclusive right to income incident thereto; all of it can be taken for his debts; he has therefore the exclusive right to use it as a basis for credit; he has the right to have it all applied to the payment of his debts upon his death; as to the personal property, he has the further and exclusive right of transfer and disposition and of gift, and can likewise convey real estate if his wife is not a resident of Nebraska; he has the power to convey real estate, without his resident wife's signature, and put his purchaser into possession, and, if his wife predeceases him, the title is absolute. He has every right of ownership, save that he cannot will it without her consent; and as to real estate with a resident wife, his deed is conditioned on him outliving her; and, perhaps, he cannot give away or dissipate property in fraud of her."

A husband quite obviously cannot adversely affect his wife's interest in property held as tenants by the entirety in the same way that he can affect or even defeat her dower interest in his separate property. Property held as tenants by the entirety is not liable for the payment of the husband's debts or administration expenses and is unaffected by judgments or bankruptcy proceedings against him. The husband cannot convey or other-

wise dispose of his interest in the property; he cannot convey his expectancy of survivorship; his deed, instead of being voidable, is absolutely void.

It is said on behalf of the United States that "as to the husband, there was a 'termination by death' of 'legal incidents of property through which its use or economic enjoyment may be controlled'." (Brief in Tyler case, page 18.) It is admitted that "termination by death of legal incidents of property through which its use or economic enjoyment may be controlled" does result in a transfer of property at death. But it is denied that the termination by death of legal incidents of property which do not comprehend the power to control its use or economic enjoyment or for the first time bring to those who come after the economic use or benefit, may result in a transfer of property at death. In Chase National Bank v. United States, supra, the legal incident which was terminated by death was the power to change the names of the beneficiary of certain insurance policies.

The termination by death of the husband's power to prevent the wife from alienating or encumbering property held by them as tenants by the entirety does not effect a transfer at death. By Section 1 of the Act of June 8, 1893, P. L. 344 (West's Penna. Statutes, 1920 ed., Sec. 14569) it is provided that a married woman "may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance". The wife's deed without her husband's joinder is a nullity: Richards v. McClelland, 29 Pa. 385 (1857); Bingler v. Bowman, 194 Pa. 210 (1899). It would scarcely be contended, however, that a wife's separate property is, upon her husband's death, transferred to her and therefore subject to an estate tax.

The release of the property from the "dominion and control" of the decedent tenant, brought about by his death, does not operate as a transfer of the property at

death. His dominion and control, like that of the settlor of the five trusts in the Reinecke case, was not exclusive. Moreover, he had no exclusive power to control the disposition of the property after his death.

On page 19 of the Government's brief in the Tyler case, stress is laid on the fact that after the decedent tenant's death the survivor has a sole interest, sole power of management and the power of testamentary disposition. But these powers were not transferred by the decedent tenant at his death. He did not enjoy them himself. All these powers were vested irrevocably in the surviving tenant under the original grant. The fact that she did not enjoy them during the decedent's lifetime is immaterial. They were enjoyed and exercised by them as the unity holding the estate. Judge Woolley in his opinion has ably demonstrated the fallacy of the Government's circular argument in this respect. (See Record, pp. 15-16.)

It is urged that taxes are practical matters and that this Court should disregard the "legal fiction" that upon the death of one tenant by the entirety, the surviving tenant takes no new estate. Unquestionably, taxes are practical matters. But this Court cannot disregard the inherent nature and incidents of an estate by the entirety as it exists under the law of Pennsylvania. That upon the creation of an estate by the entirety each tenant becomes seized of the whole, with the immediate right of use and enjoyment thereof; that neither tenant can deprive the other of his interest; that the death of one tenant obliterates his interest; and that the estate, vested irrevocably in the surviving tenant at the inception of the tenancy, includes the right to use and enjoy the whole property both during the decedent tenant's lifetime and after his death, are all incontrovertible realities. To disregard any of them is to destroy the estate. Such realities cannot be fictions; they constitute rules of property, and as such confer substantial substantive rights.

Counsel for the Government virtually concede that there is no transfer of any interest or estate upon the death of a tenant by the entirety. It is argued, however, that the subject of the tax imposed by the Revenue Act of 1921 is the "transfer of use or economic benefit upon the death of a decedent". (Brief for United States in Tyler case, page 20.) This argument ignores the elemental principle that the subject of an estate tax can be only the transmission of property at death. A shifting of use and enjoyment may accompany a transfer of property; but it is not in itself tantamount to a transfer of property. This was pointed out by Judge Woolley in his opinion in the Provident Trust Company case, when he said (Record, p. 16):

> "A mere change of status, though accompanied by economic benefits, does not necessarily involve a transfer of an interest in property, even if the change be brought about by death. It can hardly be said that the change effected by death of the tenant of a particular estate involves a transfer of his estate to the remainderman when, in law, the two estates were created at the same time long before, the estate of the remainderman having vested at the time of its creation."

Furthermore, an estate tax cannot be imposed upon the mere shifting at death of the use or enjoyment of property "which originally belonged to decedent or was purchased solely with his money". (Brief for United States in Tyler case, page 20.) If, for example, a decedent purchased an annuity and died shortly thereafter, it could not reasonably be contended that the value of the annuity should be included in his gross estate for estate tax purposes.

Even if it were true that the subject of an estate tax can be the mere shifting of use and enjoyment at

death, nevertheless the imposition of a tax on a tenancy by the entirety would still be unjustifiable. For there is not even a shifting of use and enjoyment at the death of the decedent tenant. The decedent tenant's use and enjoyment, together with his whole interest in the property, is simply wiped out by his death. The surviving tenant, by virtue of rights vested in her by the creative instrument, had the use and enjoyment of the entire property before his death; after his death she has the same use and enjoyment, by virtue of the same rights. Furthermore, the surviving tenant enjoys no new rights which formerly belonged to or were enjoyed by the decedent tenant.

Upon the death of one tenant by the entirety there is neither transmission of title or interest in property nor shifting of use and enjoyment. There is only a cessation or obliteration of an interest. An estate tax, which is the only form of tax Section 401 of the Revenue Act of 1921 purports to impose, can be predicated only upon the exercise of the privilege of transmitting property at death. To establish the exercise of this privilege by a decedent in respect of property held by himself and his spouse as tenants by the entirety, it is not sufficient to show that the decedent's interest in such property has been obliterated by his death. It would not even be sufficient to show that there was a shifting of use and enjoyment of the property at his death. It would have to be shown that some interest of the decedent was, at his death, transferred by him to the surviving tenant, and that he could, up to the moment of his death, have prevented such transfer by the exercise or non-exercise of powers vested in himself alone.

At page 20 of the brief for the United States in the Tyler case it is said:

> "Thus the effect of the creation of the tenancy by the entirety is the initial step in the gift from the

owner to the spouse, which is completed by the donor's death, for, until death, it could not be ascertained whether the spouse could ever take the property."

It is immaterial that the surviving tenant's interest might possibly have been defeated by her death during the decedent's lifetime; for it was not within the power of the decedent to bring about the destruction of her interest in this way. The decedent was even more powerless than the settlor of the five trusts in the Reinecke case.

The whole argument of counsel for the United States would seem to be predicated upon the assumption that the Congress intended to impose the estate tax upon the original transfer by which the tenancy was created, on the theory that this transfer remained incomplete until death. For reasons already stated, this transfer was complete, as to the transferor, the moment the estate was created. In this respect it was the same as any other irrevocable gift inter vivos. The provisions of the Act, however, conclusively show that the Congress intended to impose the tax on an entirely different transfer, which it mistakenly believed to be both commenced and completed at death. Section 402 (d), after requiring the inclusion of the value of property held as tenants by the entirety in the gross estate, proceeds:

> "*Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, . . . then to the extent of one-half of the value thereof."

Where the original transfer to a decedent and his spouse as tenants by the entirety is by gift, bequest, devise or inheritance from some one else, the decedent cannot be said to be the original transferor. If the Congress intended to impose the tax on the transfer by which the

tenancy was created, then it has deliberately attempted, by the above-quoted provision of Section 402 (d), to tax the decedent's estate for transfers made by some one else. The only inference, therefore, which can reasonably be drawn from the above provision is that the Congress did not intend to tax the original transfer.

The foregoing provision of the Revenue Act of 1921 in respect of tenancies created by gift, bequest, devise or inheritance is for another reason irreconcilable with the construction which counsel for the United States would place upon the Act. At pages 19-20 of the brief for the United States in the Tyler case it is stated:

> "Analysis of the Estate Tax Act makes clear the intention of bringing within its scope all property as to which there is a transfer of use or economic benefit upon the death of a decedent. This inclusiveness is limited so as to apply only to that part of the property which originally belonged to decedent or was purchased solely with his money."

By requiring the inclusion in the gross estate of one-half the value of property acquired by gift, bequest, devise or inheritance, the Congress has required the inclusion of property which did not originally belong to decedent and which was not purchased solely with his money.

Such incongruities inevitably follow from any attempt to depart from the fundamental principle "that transmission by death . . . is alone the generating source from which the taxing power, here exercised, takes its being". (Opinion of Judge Woolley, Record p. 16.)

On page 21 of the brief for the United States in the Tyler case it is stated: "The Act must 'at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another'. Chase National Bank v. United States, supra, page 337". Separated from its con-

text, the language quoted from the Chase National Bank case tends to convey a meaning entirely different from that which was intended. Its true import is disclosed by quoting more fully from the opinion of Mr. Justice Stone, at page 337:

> "But the plaintiff says that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used": Mr. Chief Justice Marshall in COHENS v. VIRGINIA, 6 Wheat. 264, 399, 5 L. ed. 257.

It is not contended that property held by a husband and wife as tenants by the entirety is immune from taxation. Presumably, under the decision of this Court in BROMLEY v. McCAUGHN, 280 U. S. 124 (1929), the original transfer of the property by the decedent tenant to himself and spouse as tenants by the entirety could be subjected to a gift tax. But, as this Court has already said of the tax imposed by Section 401 of the Revenue Act of 1921, it "is not a gift tax and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126". Reinecke v. Northern Trust Co.,

supra, page 347. The only privilege upon the exercise of which Section 401 of the Act attempts to impose a tax is *the privilege of transmitting property at death*. If this privilege has not been exercised by the decedent in respect of property held as tenants by the entirety, the inclusion of the value of such property in the gross estate constitutes the imposition of a direct tax which, because it is unapportioned, is unconstitutional. It is not necessary to ascertain whether the decedent prior to death exercised any other privilege which might be made the subject of an excise tax. (See also Appeal of Root, 5 B. T. A. 696.)

The matters discussed in Part III of the petitioners' Argument have already been considered in this brief. (pages 36 to 38). It is submitted that the Congress cannot, by setting up an "artificial entity" (the value of the net estate), impose an estate tax upon property which could not otherwise be reached by such a tax. In Frick v. Pennsylvania, 268 U. S. 473 (1925), this Court, by Mr. Justice Van Devanter, pointed out that to permit a tax to be measured by a standard which takes no account of the distinction between what is taxable in itself and what is not taxable in itself "would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail". (p. 495.)

The measure of a tax imposed upon the exercise of a particular privilege must include only property in respect of which the privilege is exercised. See NICHOLS v. COOLIDGE, supra, FRICK v. PENNSYLVANIA, supra, FREW v. BOWERS, supra, FLINT v. STONE-TRACY CO., 220 U. S. 107 (1911), LEWELLYN v. FRICK, 268 U. S. 238 (1925).

In NICHOLS v. COOLIDGE, supra, this Court said (page 542): "Undoubtedly Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation.

This is necessary to prevent *evasion* and give practical effect to the exercise of admitted power, *but the right is limited by the necessity*". (Italics ours) The purpose of the Congress in requiring the inclusion in the gross estate of property held as tenants by the entirety was, obviously, not to prevent evasions. For it has required the inclusion of one-half the value of property acquired by way of "gift, bequest, devise or inheritance" by the decedent and spouse as tenants by the entirety, in respect of which there could not possibly be an intent to evade the tax. It is not contended that either of the tenancies by the entireties involved in the instant proceedings were created in contemplation of death.

It is said (page 25 of brief for United States in Tyler case) that married taxpayers in States where tenancy by the entirety exists can escape taxation if the provisions of Section 402 (d) of the Act are held unconstitutional. But as Mr. Justice McReynolds said in Nichols v. Coolidge, supra, (page 540), the "mere desire to equalize taxation cannot justify a burden on something not within congressional power". It is not claimed that estates by the entirety are immune from every form of taxation.

The power to require the inclusion in the gross estate of the value of property held by a decedent and spouse as tenants by the entirety is not a "necessary adjunct" to the power to levy estate taxes. The object sought to be reached by an estate tax is property transmitted at death. But since property held by a decedent and spouse as tenants by the entirety is never transmitted by the decedent tenant at his death, the inclusion of such property in the value of his gross estate will not in the least facilitate the collection of an estate tax. Furthermore, the imposition of an unapportioned direct tax is expressly forbidden by the Constitution. In SCHLESINGER v. WISCONSIN, 270 U. S. 230, 240 (1926), this Court held that a

"forbidden tax cannot be enforced in order to facilitate the collection of one properly laid".

It is immaterial that in each of the instant cases the property held by the decedent and spouse as tenants by the entirety originally belonged to the decedent. The decedent did not, in respect of such property, exercise the particular privilege upon which alone an estate tax can be predicated; his estate or the property of another should not be taxed for a privilege not exercised by him.

The decisions of the Circuit Court of Appeals for the Third Circuit in the Provident and Girard cases are consonant with the general consensus of opinion on this question. See Dime Trust and Safe Deposit Co. v. Phillips, 30 Fed. (2d) 395, Blount v. United States, 59 Court of Claims 328, Appeal of Root, 5 B. T. A. 696, Appeal of Dyer, 5 B. T. A. 711, Appeal of Murphy, 5 B. T. A. 952. See also Handy on Inheritance and Other Like Taxes, 1929 ed., Chapter XI, pp. 127-135.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals for the Third Circuit in both cases herein should be affirmed.

Respectfully submitted,

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APPENDIX A.

In BRUSHABER v. UNION PACIFIC RAILROAD, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. Rep. 236, Mr. Chief Justice White said (pages 12-14):

"That the authority conferred upon Congress by sec. 8 of article 1 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again, it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of art. 1, sec. 8, cl. 1, that 'all duties, imposts and excises shall be uniform throughout the United States', and to the limitations of art. I., sec. 2, cl. 3, that 'direct taxes shall be apportioned among the several states', and of art. 1, sec. 9, cl. 4, that 'no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken'. In fact, the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in Pollock v. Farmers' Loan & T. Co. 157 U. S. supra, at page 557: 'In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must

be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises'. It is to be observed, however, as long ago pointed out in Veazie Bank v. Fenno, 8 Wall. 533, 541, 19 L. ed. 482, 485, that the requirements of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all-embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted. In the whole history of the government down to the time of the adoption of the 16th Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes and embraced by neither, no question has been anywhere made as to the correctness of these propositions."

APPENDIX B.

Tenancy by the entirety is recognized in the following States:

Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey (as to real property only), New York, North Carolina, Oregon (as to real property only), Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming.

In the following States, property held as tenants by the entirety is not subject to any form of State inheritance tax:

Arkansas, Delaware, Florida (no inheritance tax law), Indiana, Maryland, Massachusetts (real property not

taxed; personal property doubtful), Michigan, Missouri, New Jersey, Oregon, Pennsylvania, South Carolina, Vermont, Virginia.

In West Virginia property held as tenants by the entirety is, by express statutory provision, not subject to State inheritance tax unless the entire property originally belonged to decedent.

In the following States property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of one-half its value:

Colorado, Kentucky, Montana, New York, Wyoming.

In North Carolina property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of one-half its value unless the decedent furnished the entire purchase price, in which case it is taxable at its full value.

In Tennessee property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of one-half its value or the value of such other part as can be shown to have originally belonged to the decedent.

In Iowa, Mississippi, Rhode Island and Utah property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of its full value less the value of such part as originally belonged to or was purchased by the surviving tenant.

SUPREME COURT OF THE UNITED STATES.

Nos. 428, 546 and 547.—October Term, 1929.

James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, Petitioners, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
The United States of America, Petitioner, vs. Provident Trust Company of Pennsylvania, and Charles Sinkler, Administrators c. t. a. of the Estate of James K. Young, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
Robert H. Lucas, Commissioner of Internal Revenue, Petitioner, vs. Girard Trust Company and Joseph L. Woolston, Executors of the Estate of Beulah H. J. Woolston, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 19, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

These cases present the question whether property owned by husband and wife as tenants by the entirety may be included, without contravening the Constitution, in the gross estate of the decedent spouse for the purpose of computing the tax "upon the transfer of the net estate" imposed by the revenue acts of 1916, c. 463, 39 Stat. 756, 777-778, and of 1921, c. 136, 42 Stat. 227, 277-278.

In No. 428, which arose under the act of 1916, the decedent had been a resident of Maryland. At the time of his death, he and his wife owned as tenants by the entirety shares of stock in a West Virginia corporation doing business in Maryland. The decedent

had been the sole owner of the stock and created the tenancy by a conveyance executed in 1917. The stock was included in the gross estate of the decedent at its value at the time of his death. The total tax assessed was paid, and the administrators brought suit to recover the portion of the amount so paid attributable to the stock, together with interest. The trial court gave judgment against the government, 28 F. (2d) 887, which was reversed by the court of appeals. 33 F. (2d) 724.

In No. 546, which arose under the act of 1921, the decedent and his wife, residents of Pennsylvania, held title to certain ground rent and to certain real estate in that state which had been conveyed to them as tenants by the entirety. The property had been acquired with the husband's separate funds and no part of the purchase price was furnished by the wife. The decedent died in 1923 leaving his wife as sole beneficiary under his will. The administrators filed an estate tax return which did not include the property interests above described. The Commissioner of Internal Revenue added this property to the gross estate and assessed a deficiency of taxes on that account. The Board of Tax Appeals held there was no deficiency. 5 B. T. A. 1004. Suit thereupon was instituted by the Commissioner in a federal district court. That court held that the section of the act which authorized the inclusion of the property was unconstitutional, and gave judgment against the government. This judgment the court of appeals affirmed. 35 F. (2d) 339.

In No. 547, which also arose under the act of 1921, the decedent owned real estate in Pennsylvania, of which state she was a resident. In 1923 the property was conveyed to a third person, who, in turn, reconveyed it to the decedent and her husband as "tenants by the entireties." After the death of the decedent, the Commissioner, for the purpose of computing the estate tax, included in her gross estate the value of the real estate so held. On appeal the Board of Tax Appeals held this inclusion to be erroneous. 10 B. T. A. 1100. The Commissioner filed a petition for review with the court of appeals, and that court affirmed the action of the board upon the authority of No. 546, which had just been decided. 35 F. (2d) 343.

In each case the estate was created after the passage of the applicable act; and none of the property constituting it had, prior to its creation, ever belonged to the surviving spouse.

The relevant provisions of the two acts are the same, and it will be sufficient to quote from the act of 1916.

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(e) To the extent of the interest therein held jointly or as tenants in [by] the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The applicable provision of § 202(e) is explicit, and the intent of Congress thereby to impose the challenged tax is not open to doubt. The sole question is in respect of its constitutional validity. The attack is upon two grounds: (1) that so far as the tax is based upon the inclusion of the value of the interest in the estate held by the decedent and spouse as tenants by the entirety, it is an unapportioned direct tax and violates Art. 1, § 2, cl. 3 and § 9, cl. 4 of the Constitution; (2) that such a tax amounts to a deprivation of property without due process of law in violation of the Fifth Amendment.

The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound. *Warburton* v. *White*, 176 U. S. 484, 496.

1. The contention that, by including in the gross estate the value of property held by husband and wife as tenants by the entirety, the tax *pro tanto* becomes a direct tax—that is a tax on property—

and therefore invalid without apportionment, proceeds upon the ground that no right in such property is transferred by death, but the survivor retains only what he already had. Section 201 imposes the tax "upon the transfer of the net estate"; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute. But § 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present. Prior decisions of this court do not solve the problem thus presented, though what was said in *Chase National Bank* v. *United States,* 278 U. S. 327, 337-339; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; and *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, constitutes helpful aid in that direction.

Death duties rest upon the principle that death is the "generating source" from which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." *Knowlton* v. *Moore,* 178 U. S. 41, 56, 57. But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own. *Karnuth* v. *United States,* 279 U. S. 231, 242. A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. See *Nicol* v. *Ames*, 173 U. S. 509, 516; *Saltonstall* v. *Saltonstall, supra*, p. 271.

Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect.

2. The attack upon the taxing act as constituting a violation of the Fifth Amendment is wholly without merit. The point made is that the tax is so arbitrary and capricious as to amount to confiscation, and, therefore, to result in a deprivation of property without due process of law. The tax, as we have just held, falls within the power of taxation granted to Congress, and the challenge becomes one not to the power, but to an abuse of it. The possibility that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded—*Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24, and cases cited; *Nichols* v. *Coolidge*, 274 U. S. 531, 542—but the present statute is not of that character. To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect of tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. *Taft* v. *Bowers*, 278 U. S. 470, 482.

No. 428, judgment affirmed.
No. 546, judgment reversed.
No. 547, judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.